Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Washington Constitution provides that no public money shall be appropriated or applied to religious instruction. Following this constitutional command, Washington does not grant college scholarships to otherwise eligible students who are pursuing a degree in theology. Does the Free Exercise Clause of the First Amendment require the state to fund religious instruction, if it provides college scholarships for secular instruction?

PARTIES

The parties to the proceeding below were:

Petitioners: Gary Locke, Governor of the State of Washington; Marcus S. Gaspard, Executive Director of the Washington Higher Education Coordinating Board; Bob Craves, Chair of the Higher Education Coordinating Board; and John Klacik, Associate Director of the Higher Education Coordinating Board. Petitioners were aligned as defendants/appellees below.

Respondent: Joshua Davey. Respondent was aligned as plaintiff/appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Washington Governor Gary Locke and officials of the Higher Education Coordinating Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 299 F.3d 748. App. 1a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. App. 86a. The opinion of the United States District Court for the Western District of Washington is also unpublished. App. 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered July 18, 2002. On November 26, 2002, the court of appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App. 86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Exercise Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."

The Washington Constitution article I, section § 11 provides, in part:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" App. 88a.

Wash. Rev. Code § 28B.10.814 provides: "No aid shall be awarded to any student pursuing a degree in theology." App. 92a.

Other relevant statutes and regulations are set out in the appendix. These include the legislative appropriation that began the Promise Scholarship program (App. 89a), the regulations adopted to implement the program (App. 97a), and the statutes establishing the program on a continuing basis (App. 92a).

STATEMENT

This case concerns a challenge to Washington's Constitution and a state statute that prohibit using public funds to pay for religious instruction. The question is whether the Free Exercise Clause of the First Amendment of the United States Constitution requires the state to pay for religious instruction when it pays for secular instruction.

1. Since statehood in 1889, the Washington Constitution has guaranteed every individual "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship[.]" Wash. Const. art. I, § 11; App. 88a. The 1889 Constitution also requires a strong separation between church and state. The Washington Constitution commands that "*[n]o public money* or property *shall be*

appropriated for or applied to any religious worship, exercise or *instruction*, or the support of any religious establishment[.]" Wash. Const. art. I, § 11; App. 88a (emphasis added).

The Washington Supreme Court has interpreted this constitutional command to prohibit using public funds to pay for "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct". *Calvary Bible Presbyterian Church v. Bd. of Regents*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. denied*, 393 U.S. 960 (1968). To implement this constitutional requirement, the Washington Legislature adopted Wash. Rev. Code § 28B.10.814, which provides: "No aid shall be awarded to any student pursuing a degree in theology." App. 92a.

2. In 1999, the Washington Legislature created the Promise Scholarship program, to be administered by the Higher Education Coordinating Board (HEC Board).[1] The purpose of the program was to provide scholarships to high school graduates with high academic marks who may not have the financial ability to attend college. The scholarship is

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[1] The Promise Scholarship began as a pilot program in the 1999 appropriations act. 1999 Wash. Laws ch. 309(6)(i); App. 89a. The HEC Board was directed to evaluate the impact and effectiveness of the program and report to the Governor and the Legislature. 1999 Wash. Laws ch. 309(6)(i)(vii); App. 91a. Subsequently, in March 2002, the Promise Scholarship was adopted as a continuing statutory program. *See* Wash. Rev. Code § 28B.119.010; App. 92a.

awarded for the first year of college and may be renewed for a second year. To be eligible for a Promise Scholarship, applicants must meet academic and financial requirements. For example, to qualify for a scholarship for the 1999-2000 school term, applicants had to be in the top 10 percent of their high school class and have a family income that did not exceed 135 percent of the state's median family income.

A student who is eligible for a scholarship must also meet enrollment requirements to receive the money. First, the student must be enrolled at an accredited public or private college, university, or career training school located in Washington. Private sectarian institutions are eligible—so long as they are accredited. Second, the student must be enrolled at least half-time at the eligible institution. Finally, as required by article I, section 11 of the Washington Constitution and Wash. Rev. Code § 28B.10.814, the student must not be pursuing a degree in theology at the institution. To receive the money, the eligible institution must apply for the funds on the student's behalf and verify to the HEC Board that the student is enrolled, at least half-time. The institution must also verify that the student is not pursuing a degree in theology. It is left to each institution to determine what part of its own academic program constitutes a degree in theology. If the student meets the enrollment requirements, the scholarship check is sent to the institution to be disbursed to the student.

3. In 1999, respondent Joshua Davey applied for a Promise Scholarship. Davey met the academic and financial requirements, and Governor Locke and the HEC Board notified Davey that he was eligible for a Promise Scholarship for the 1999-2000 academic term. The amount of the scholarship was $1,125. In the fall of 1999, Davey was admitted to Northwest College, which is an accredited college located in Washington. As such, Northwest is an eligible institution under the Promise Scholarship program. Northwest is also a sectarian college that educates its students from a distinctly Christian point of view. Davey declared a double major in Pastoral Ministries and Business Management and Administration. Northwest College determined that under its academic program, a major in Pastoral Ministries constitutes a degree in theology. Since Davey did not meet this enrollment requirement, Northwest did not apply for Promise Scholarship funds on his behalf and no funds were disbursed to him. If the college had reported that Davey was pursuing a degree in theology at Northwest, the HEC Board would not have sent the scholarship check.

4. In February 2000, Davey brought suit in the United States District Court for the Western District of Washington against the Governor of Washington and officials of the HEC Board, in their official and individual capacities (collectively, the HEC Board). Davey alleged violations of the First and Fourteenth Amendments of the United States Constitution, as well as provisions of the Washington Constitution. Davey sought a declaratory judgment

that Washington's refusal to fund his degree in theology was unconstitutional. Davey also sought an injunction, damages, and attorneys fees.

The parties filed cross-motions for summary judgment, and the District Court entered an order granting summary judgment to the HEC Board. App. 51a. The District Court ruled that Davey's Free Exercise claim failed because it mistakenly presumed a right to have Washington taxpayers fund his religious instruction. The District Court found that *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), controlled Davey's Free Exercise claims. Holding that the state had in no way prohibited Davey from pursuing a theology degree, the court concluded that "while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits". App. 68a. The District Court also rejected Davey's claims under the Free Speech Clause and Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. And the District Court rejected Davey's claims under the Washington Constitution.

5. Davey appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the District Court in a divided opinion. App. 1a. The majority relied primarily on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618

(1978), for the proposition that "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny". App. 4a. The majority recognized that the law in this case differed from the ordinance in *Lukumi* because Wash. Rev. Code § 28B.10.814 "neither prohibits religious conduct nor does its application turn on the student's religious motivation". App. 14a. Despite this fact, the majority concluded that the HEC Board's policy discriminated on its face, because the "statute and [the HEC Board's] implementing policy refer on their face to religion" and "exclude[] only those students who declare a major in theology that is taught from a religious perspective". App. 15a. Having concluded that the law discriminates on its face against religion, the majority went on to hold that Washington's interest in upholding its constitutional bar on funding religious instruction was not sufficiently compelling to survive strict scrutiny review. App. 29a.

The HEC Board argued that this case was controlled by legal principle in *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), that a legislative decision not to fund the exercise of a constitutional right does not infringe on that right. App. 12a. The majority distinguished *Rust* and *Regan* based on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), which held that a limited public forum, established by the university to facilitate student speech, could not

exclude religious speech. Even though the majority did not base its decision on the Free Speech Clause of the First Amendment, it reasoned that when the Washington Legislature funded the Promise Scholarship program, it created a "fiscal forum" similar to the limited public forum at issue in *Rosenberger*. According to the majority, "the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion". App. 21a. The majority also distinguished *Rust* and *Regan* on the ground that Washington law was coercive because if Davey "accepts the Scholarship, he may not pursue a degree in theology (whether or not he has non-government funds to do so)". App. 24a.

The dissenting judge began by observing that "[t]his is a funding case, not a free exercise case or a free speech case." App. 33a. The dissent rejected the application of *Lukumi* and *McDaniel* because those cases involved laws that burdened the exercise of constitutional rights. In the dissenting judge's view, the law at issue in *Lukumi* prohibited "the ritualistic slaughter of animals—that constitute a central practice of the Santeria religion". App. 34a. Thus, for church members, "[t]heir choice was to practice their religion upon threat of prosecution." App. 34a. Similarly, *McDaniel* pitted a minister's "constitutional right to seek and hold office as a state citizen against the clergy-disqualification provisions". App. 36a. In contrast to fundamental rights at issue in *Lukumi* and *McDaniel*, the dissent

found that Davey's claim did not involve a "constitutional right to educational funding". App. 37a. According to the dissent, "Washington has neither prohibited nor impaired Davey's free exercise of his religion. He is free to believe and practice his religion without restriction." App. 32a. The only state action was "a decision consonant with the state constitution, not funding 'religious . . . instruction'". App. 32a.

The dissent also concluded that the state's long-standing policy of preventing state interference with religious practice by strictly limiting state involvement in religious instruction could not support the majority's conclusion that the state was aiming to suppress disfavored religious ideas. App. 20a. Finally, the dissent rejected applying *Rosenberger*. In the dissent's view, this is not a free speech case and "the decision not to fund Davey's pursuit of a pastoral ministry degree does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*". App. 45a. The dissent pointed out that Northwest College is an eligible institution, even though it is a religious college, and concluded that there was no concern that Washington "has precluded, will preclude, or is even likely to preclude Davey from being exposed to the pervasively Christian perspective that permeates every aspect of his educational experience at Northwest College". App. 46a. Thus, choosing not to fund his theology degree would not limit Davey's exposure to a Christian viewpoint.

In the dissent's view, the controlling legal precedents were *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which stand for the proposition that government decisions not to underwrite fundamental rights do not abridge those rights. App. 44a. Applying this principle, the dissent concluded that Washington had no obligation to fund Davey's theology degree.

The HEC Board filed a timely petition for rehearing and petition for rehearing en banc, which was denied. App. 86a.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Directly Conflicts With A Decision Of The Washington Supreme Court

1. The Ninth Circuit's decision conflicts squarely with the Washington Supreme Court's decision in *Witters v. Washington Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989) (*Witters* III). *Witters* III held that the state did not violate the Free Exercise Clause of the First Amendment when it followed the command of the state constitution and refused to provide public funds for religious instruction. The Ninth Circuit reached exactly the opposite conclusion.

2. The material facts of *Witters* III and the case at bar are identical. Larry Witters applied for vocational rehabilitation funds "to pursue a course of study that would prepare him for a career as a

pastor, missionary or youth director". *Witters* III, 112 Wash. 2d at 365, 771 P.2d at 1120. Witters met the medical and physical eligibility requirements to receive the funds, but the state commission for the blind denied his application because the "Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas". *Id.* at 366, 1120.

Witters challenged the commission's decision. The Washington Supreme Court upheld the denial of funds on the grounds that providing the funds would violate of the Establishment Clause of the First Amendment of the United States Constitution. *Witters v. Washington Comm'n for the Blind*, 102 Wash. 2d 624, 627-30, 689 P.2d 53, 55-57 (1984) (*Witters* I). The court did not reach the state constitutional issue. Witters petitioned for a writ of certiorari, and this Court reversed. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters* II). This Court held that providing the funds did not violate the Establishment Clause and remanded the case, noting that on "remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution". *Witters* II, 474 U.S. at 489. The Court expressly "decline[d] petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual

development reveals, and we express no opinion on that matter". *Witters* II, 474 U.S. at 489-90.

On remand in *Witters* III, the Washington Supreme Court held that providing funds to Witters would violate article I, section 11 of the Washington Constitution, which prohibits "the application of public funds to religious instruction". *Witters III*, 112 Wash. 2d at 370, 771 P.2d at 1122. The court also rejected Witters' Free Exercise claim. *Id.* at 372, 1123 ("[T]he Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [an] applicant to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.").

The Washington Supreme Court continues to adhere to the principle in *Witters* III that the Washington Constitution prohibits using public funds to pay for religious instruction. In *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 48 P.3d 274 (2002), the Court discussed *Witters* III with approval and upheld a different student aid program that could be used to attend religious colleges because public funds could not be used to pay for religious instruction. *Gallwey*, 146 Wash. 2d at 468, 48 P.3d at 285 ("The distinction between this case and *Witters* [III] is obvious. Here, the grants are made contingent upon a student's adherence to the EOG Program's religious *exclusion* which provides that no

student will be enrolled in any program that includes religious worship, exercise, or instruction.").

3. The Ninth Circuit declined to follow *Witters* III, even though it recognized the holding of the Washington Supreme Court. App. 26a ("On remand, the Washington Supreme Court held that extending aid would violate the Washington Constitution's prohibition on appropriating and applying public funds to religious instruction, and would not infringe the applicant's right to the free exercise of religion.").

4. The conflict between the Ninth Circuit and the Washington Supreme Court is significant and requires immediate resolution by this Court. First, the result of the conflict between the Ninth Circuit and the Washington Supreme Court is that the proper rule of law to be applied in Washington is unknown. If a challenge to using state funds to pay for religious instruction is brought in state court, there will be one answer—if the same challenge is brought in federal court, there will be a different answer. This is an intolerable situation. When there is a conflict between different circuits or different state courts, the law within each circuit or state is settled; the question on certiorari is the need for national uniformity. In Washington, however, two courts have issued two completely irreconcilable decisions. The conflict between the Ninth Circuit and the Washington Supreme Court imposes a state

of confusion that can only be settled by a decision of this Court.[2]

5. Second, this case involves the validity of a provision of the Washington Constitution—the fundamental source of state law in Washington—not simply a state statute. Article I, section 11 of the Washington Constitution prohibits funding religious instruction and imposes a stricter separation of church and state than the Establishment Clause of the First Amendment of the United States Constitution. This requirement has been a limitation of the exercise of legislative power since 1889, when Washington was admitted to the Union. The Ninth Circuit's holding is nothing less than a declaration that article I, section 11 is unconstitutional under the Free Exercise Clause. App. 30a-31a ("Nor does the establishment clause in Washington's Constitution excuse [the HEC Board's] disabling Davey from receipt of the Promise Scholarship to which he was otherwise entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology."). This Court is the appropriate tribunal to decides whether a state constitutional provision runs afoul of the United States Constitution.

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[2] In the past, this Court has granted review to resolve a conflict between a federal court and a state supreme court over the constitutionality of the state's law. *Seling v. Young*, 531 U.S. 250, 260 (2001) ("This Court granted the petition for a writ of certiorari to resolve the conflict between the Ninth Circuit Court of Appeals and the Washington Supreme Court." (citation omitted)).

B. The Conflict Between The Washington Supreme Court And The Court Of Appeals Is Based On The Ninth Circuit's Failure To Properly Apply This Court's Decisions

1. The conflict between the Washington Supreme Court and the Court of Appeals is the result of the Ninth Circuit's failure to properly apply this Court's precedent. The Court has decided a consistent line of cases holding that a legislative decision not to fund the exercise of a constitutional right does not infringe on that right. *Maher v. Roe*, 432 U.S. 464 (1977) (no right to Medicaid funding for medical services incident to constitutionally protected right to nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (no right to Medicaid funding for medical services incident to constitutionally protected right to medically necessary abortions); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (no right to tax exempt status for nonprofit organizations engaged in First Amendment lobbying activities); *Rust v. Sullivan*, 500 U.S. 173 (1991) (no right to federal funds to engage in First Amendment family planning service related to abortion). A straightforward application of this principle here sustains Washington's constitutional ban on using public funds to pay for religious instruction.

2. Instead of following this well-established precedent, the Ninth Circuit tangled up its analysis with other lines of decisions that do not apply. The Court's free exercise cases deal with laws that

actually impact the practice of religion—as opposed to public funding of the exercise of a religious right. *Sherbert v. Verner*, 374 U.S. 398 (1963) (law requiring Saturday work in violation of religion to obtain unemployment compensation); *McDaniel v. Paty*, 435 U.S. 618 (1978) (law prohibited minister from exercising constitutional right to hold office); *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (logging and road-building in forest used for religious purposes); *Empl. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (law prohibiting use of peyote employed in religious ceremony); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibiting sacrifice of animals as part of religious ceremony).

Unlike these free exercise cases, Washington's constitutional prohibition against public funding of religious instruction does not impair Davey's free exercise of his religion—he is free to believe and practice his religion without restriction. The Washington Constitution does not even prevent Davey from majoring in theology. He is free to use his scholarship at Northwest College to obtain a degree in Business Management and Administration, while simultaneously pursuing a theology degree at a different college—using his own funds.

3. The Ninth Circuit also tangled up its analysis with this Court's free speech cases that hold if the government establishes a limited public forum for speech, it may not exclude religious speech that falls within the purpose of the forum. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384

(1993) (limited public forum to use school property for social, civic and recreational meetings and entertainment and such other uses pertaining to the welfare of the community could not exclude religious speech); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (limited public forum for speech of university recognized student groups could not exclude religious speech); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (limited public forum for social, civic and recreational meetings and entertainment and such other uses pertaining to the welfare of the community could not exclude religious speech); *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533 (2001) (funding for legal services attorneys to engage in advocacy speech on behalf of private clients could not exclude speech related to welfare reform or a challenge to existing welfare laws).

These cases involving First Amendment speech rights do not apply because the state's decision not to fund Davey's religious instruction does not restrict Davey's free speech rights. He remains free to engage in any religious speech he chooses. Nor does the state interfere with Davey's ability to be exposed to a religious point of view. Northwest College is a religious school with a distinctively Christian point of view. Since Northwest is an eligible institution, Davey could attend Northwest—using his scholarship—and be exposed to that Christian point of view. The only thing he cannot do is use the scholarship to pursue a degree in theology.

4. The urgent conflict between the Washington Supreme Court and the Ninth Circuit requires review. This case also presents a good vehicle to straighten out the tangle the Ninth Circuit has made in the law.

C. The Question Presented Has Significance Beyond The State Of Washington

1. This case also has national significance beyond the intolerable conflict between the Washington Supreme Court and the Ninth Circuit. First, like Washington, nineteen states have constitutions that expressly prohibit using public funds to support religion.[3] For example, the Missouri Constitution prohibits using public funds "to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever". Mo. Const. art. IX, § 8; App. 111a.

2. Also like Washington, state courts have enforced these constitutional funding restrictions to strike down laws that would have been valid under

[3] Cal. Const. art. XVI, § 5; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, ¶ VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ky. Const. § 189; Mass. Const. art. XLVI, Amendments, art. XVIII, § 2; Mo. Const. art IX, § 8; Mont. Const. art. X, § 6; Nev. Const. art. XI, § 10; N.M. Const. art. XII, § 3; N.D. Const. art. VIII, § 5; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7; Vt. Const. ch. 1, art. III; Wyo. Const. art. I, § 19. The text of these constitutional provisions are set out in the appendix starting at page 107a.

the federal Establishment Clause. For example, this Court has ruled that using public funds to provide text books and bus transportation to students attending religious schools does not violate the Establishment Clause. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (state law authorizing school districts to pay for bus transportation for school children—including those who attended religious schools—did not violate the Establishment Clause); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (state law authorizing the loan of textbooks to students attending private schools—including religious schools—did not violate the Establishment Clause).

But, state courts have struck down similar laws using public funds to pay for loaned textbooks and student transportation based on provisions of their state constitutions, despite the fact there was no federal Establishment Clause violation. In *California Teachers Association v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981), the California Supreme Court struck down a law authorizing loaned textbooks. The court declined to follow *Allen* because it was interpreting the state constitution, not the federal constitution. *Riles*, 29 Cal. 3d at 812, 632 P.2d at 963-64, 176 Cal. Rptr. at 311-12 ("We decline to follow the rationale of *Allen* . . . . In any event, it is not the meaning of the First Amendment which is critical to our determination, but . . . the California Constitution."); *Paster v. Tussey*, 512 S.W.2d 97, 103-04 (Mo. 1974), *cert. denied sub nom. Reynolds v. Paster*, 419 U.S. 1111 (1975) (same, textbooks); *McDaniel v. Sch. Bd. of the*

Yankton Indep. Sch. Dist. 1, 90 S.D. 599, 604-05, 246 N.W.2d 93, 96 (1976) (same, textbooks); *Fannin v. Williams*, 655 S.W.2d 480, 483-84 (Ky. 1983) (same, textbooks); *Dickman v. Sch. Dist. 62C*, 232 Or. 238, 260-61, 366 P.2d 533, 545 (1961), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962) (same, textbooks); *Opinion of the Justices in Response to Question Propounded by Governor*, 59 Del. 196, 200-01, 216 A.2d 668, 671 (1966) (same, transportation); *Spears v. Honda*, 51 Haw. 1, 15, 449 P.2d 130, 138-39 (1969) (same, transportation); *Bd. of Educ. v. Antone*, 384 P.2d 911, 912-13 (Okla. 1963) (same, transportation).

The implication of the Ninth Circuit's ruling is that state constitutional restrictions against using public funds to support religion violate the Free Exercise Clause of the First Amendment. This result is inconsistent with these state court decisions that apply their specific constitutional prohibitions on the use of public funds.

3. Moreover, there is a substantial tension between the Ninth Circuit's decision and decisions applying state constitutional restrictions on the use of public funds in the face of Free Exercise claims. In *Chittenden Town School District v. Department of Education*, 169 Vt. 310, 738 A.2d 539 (1999), *cert. denied sub nom. Andrews v. Vermont Department of Education*, 528 U.S. 1066 (1999), the court considered a law authorizing school districts to provide a high school education for their students by paying tuition at nonpublic schools selected by their parents. The court held that the program did not

violate the Establishment Clause, but did violate the stricter provisions of the Vermont Constitution, which provides that no person "can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience". *Chittenden*, 169 Vt. at 324, 342-43, 738 A.2d at 549, 562-63. The court went on to reject the claim that the Free Exercise Clause required the state to pay tuition at religious schools. *Id.* at 343-44, 563-64 ("today's ruling requires no one to choose between following the precepts of his or her religion and forfeiting benefits that would otherwise be available from the government" (at 344, 563)). *See also*, *Epeldi v. Engelking*, 94 Idaho 390, 396-97, 488 P.2d 860, 866-67 (1971), *cert. denied*, 406 U.S. 957 (1972) (Free Exercise Clause did not require the state to provide bus transportation to students attending religious schools); *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 384-87 (W.D. Mo. 1973), *affirmed*, 419 U.S. 888 (1974) (same).

4. The second reason the Ninth Circuit's decision has national significance is that Washington's prohibition of using public funds to pay for a degree in theology is not a unique restriction. Fourteen other states have exactly the same or similar restrictions in their statutes authorizing financial aid for college students.[4] For example, New

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[4] Ala. Code § 16-33A-1(4)(f) (2002) (an eligible student is "not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity"); Fla. Stat. Ann. § 240.605(4)(b)(2) (West 2002) ("A person is eligible to receive [a grant] if . . .[h]e or she is not enrolled in a program of study leading to a degree in theology or divinity[.]"); Ky. Rev. Stat. Ann. § 164.753(3)(c) (Banks-Baldwin 2002)

Jersey has exactly the same requirement. N.J. Stat. Ann. § 18A:71B-20(b) (West 2003) ("A student who is

("Restrict scholarships to persons who . . . are not planning to enroll or are not enrolled in a program of study leading to a certificate, diploma or degree in theology, divinity or religious education[.]"); La. Rev. Stat. Ann. § 1675(5) (West 2003) ("A person shall be eligible for consideration for a scholarship if . . . [h]e shall not be a major in religious studies or theology."); Md. Code Ann., Education § 18-104(b)(2) (2002) ("The recipient of a scholarship may not be . . . [r]equired to take sectarian religious courses to qualify for a degree."); Mich. Comp. Laws § 390.994(2) (2003) ("A grant shall not be made under this act to a student who is enrolled in a program of study leading to a degree in theology, divinity, or religious education."); Mo. Ann. Stat. § 173.215(1.6) (West 2002) ("No award shall be made under sections 173.200 to 173.230 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity."); N.Y. Educ. Law § 661(6) (McKinney 2003) ("no such awards shall be used to obtain professional instruction in theology"); Ohio Rev. Code Ann. § 3333.27(B) (West 2002) ("No grant shall be made to any student enrolled in a course of study leading to a degree in theology, religion, or other field of preparation for a religious profession unless the course of study leads to an accredited bachelor of arts or bachelor of science degree."); Or. Rev. Stat. § 348.186(3) (2001) ("The Oregon Student Assistance Commission may not award an Oregon Achievement Grant to a qualified student who is enrolled in a course of study required for and leading to a degree in theology, divinity or religious education."); 59 S.C. Code Ann. Regs. § 113-20(e) (2002) (a qualified applicant "is not enrolled in a course of study leading to a degree in theology, divinity, or religious education"); S.D. Codified Laws § 13-55B-1(2) (Michie 2002) ("Qualified student . . . is not enrolled in a course of study leading to a degree in theology or religious education[.]"); Wis. Stat. Ann. § 39.30(2)(d) (West 2003) ("No grant shall be awarded to members of religious orders who are pursuing a course of study leading to a degree in theology, divinity or religious education.").

enrolled in a course leading to a degree in theology or divinity shall not be eligible for a tuition aid grant.").

Thus, the Ninth Circuit's decision is likely to have a wide impact beyond the State of Washington. Given the national scope of this restriction, this Court should grant review to settle the issue.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 24, 2003

No. 00-35962

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSHUA DAVEY,

Plaintiff-Appellant,

v.

GARY LOCKE, Gov., individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted
May 6, 2002 – Seattle, Washington

Filed July 18, 2002

Before: Pamela Ann Rymer, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges

Opinion by Judge Rymer;
Dissent by Judge McKeown

SUMMARY

Individual Rights/Religious Freedom

The court of appeals reversed a judgment of the district court. The court held that the Washington Higher Education Coordinating Board's (HECB) policy denying a state-funded "Promise Scholarship" to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion.

In 1999, the state of Washington created the Promise Scholarship for low and middle income students who achieved an excellent academic record throughout their high school careers. To be eligible for the award, a student had to be designated in the top 10% of the 1999 graduating senior class; have a family income that is equal to or less than 135% of the state's median, and, attend an accredited public or private university, college, or other accredited post-secondary institution in the state of Washington.

Appellant Joshua Davey applied for the scholarship and was selected as a recipient in August 1999. In the fall he enrolled at Northwest College, an accredited institution affiliated with the Assembly of God. Students apply to Northwest were required to indicate "a personal commitment to Jesus Christ as Lord and Savior," and the college educated students from a "distinctly Christian" point of view. As he was a Christian who intended to become a cleric, Davey declared a double major in pastoral ministries and business management and administration. A pastoral ministries major at Northwest was designed to prepare students for a career as a Christian minister. Classes were taught from a viewpoint that t' Bible represents truth and was foundational whereas, according to HECB, theology courses at public postsecondary institutions in Washington were taught from an historical and scholarly point of view.

In October 1999, HECB notified financial aid administrators throughout the state that students pursuing a degree in theology were not eligible to receive the Promise Scholarship. Northwest determined that majors in pastoral ministries were pursuing a degree in theology, so it could not certify Davey's eligibility as HECB required. As a result, Davey had to choose whether to follow his calling, or forego the scholarship. He decided to give up the scholarship, but was able to pursue his major.

Davey brought an action in district court against appellees the Governor of Washington and officials of HECB, alleging violations of the religion clauses of the First Amendment and his federal and state constitutional rights. HECB argued that

state funding for Davey's religious instruction was barred by state law, Washington Revised Code § 28B.10.814, and the state constitution's provision regarding the separation of church and state; and that refusing to award aid to students pursuing a degree in theology was reasonably related to the bar in the Washington Constitution. Both parties moved for summary judgment, which the district court granted in HECB's favor.

Davey appealed.

The First Amendment declares: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Thus, the state may neither favor, nor disfavor, religion. The Free Exercise Clause protects religious observers against unequal treatment. Whereas a law that is neutral and of general applicability need not be justified by a compelling government interest even if it has the incidental effect of burdening a religious practice, a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commends of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.

Section 28B.10.814 and HECB's policy on their face discriminated based on religious pursuit. That the effect of the classification was not to underwrite Davey's education because it included a degree in theology did not make the classification less of a discrimination on account of

viewpoint. Davey was denied a Promise Scholarship to which he was otherwise entitled solely because he personally chose to pursue a religious major. For this reason, the restriction had to be strictly scrutinized.

Washington's interest in not appropriating or applying money to religious instruction as mandated by its constitution was less than compelling. The Promise Scholarship was awarded to students; no state money went directly to any sectarian school. Application of the proceeds of the scholarship to religious instruction was remote at best. In these circumstances it was difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his scholarship.

It had to be held that HECB's policy denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion. Therefore, the criterion that conditioned receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective had to be stricken. HECB could not rely on § 28B.10.814, because its classification based on religion was unconstitutional as applied through HECB's policy to Davey. Nor did the establishment clause in Washington's Constitution excuse HECB's disabling Davey from receipt of the Promise Scholarship to which he was otherwise

entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology.

Judge McKeown dissented, writing that this was a funding case, not a free exercise case or a free speech case, and that the Supreme Court's jurisprudence in the abortion funding cases guided the decision here.

COUNSEL

Stuart J. Roth, The American Center for Law and Justice, Mobile, Alabama, and Kevin H. Theriot, The American Center for Law and Justice, Virginia Beach, Virginia, for the plaintiff-appellant.

Michael J. Shinn, Assistant Attorney General, Seattle, Washington, for the defendants-appellees.

OPINION

RYMER, Circuit Judge.

This appeal challenges Washington law that denies a state-funded "Promise Scholarship" to students who are qualified for it by virtue of high school grades, family income, and attendance at an accredited college in the state, solely because the student decides to pursue a degree in theology.

Joshua Davey was awarded the Scholarship but lost it when he declared a major in Pastoral

Ministries at Northwest College. He claims that this was discriminatory and denied him access to funds that were otherwise available to all eligible students in violation of the religion clauses of the First Amendment and his federal and state constitutional rights to freedom of speech and equal protection. Washington's Higher Education Coordinating Board (HECB), which administers the Promise Scholarship, defends its action on the ground that the state did not prohibit Davey from pursuing religious studies but simply declined to fund them; that state funding for Davey's religious instruction is barred by state law, Wash. Rev. Code § 28B.10.814,[1] and the state constitution's provision regarding the separation of church and state;[2] and that refusing to award aid to students pursuing a degree in theology is reasonably related to the bar in the Washington Constitution.

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[1] Wash. Rev. Code § 28B.10.814 provides that "[n]o aid shall be awarded to any student who is pursuing a degree in theology."

[2] Article I, § 11 of the Washington Constitution provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment....

We conclude that HECB's policy lacks neutrality on its face. It makes the Promise Scholarship (which is neutral toward religion) available to all students who meet generally applicable criteria, except for those who choose a religious major. As this classification facially discriminates on the basis of religion, it must survive strict scrutiny. We are not persuaded that it does; Washington's interest in avoiding conflict with its own constitutional constraint against applying money to religious instruction is not a compelling reason to withhold scholarship funds for a college education from an eligible student just because he personally decides to pursue a degree in theology. Accordingly, we hold that HECB impermissibly deprived Davey of his scholarship.

I

In 1999, Washington created a new college scholarship program for low and middle income students who achieve an excellent academic record throughout their high school careers. The award is known as a "Promise Scholarship." It is available for the first year of a student's postsecondary education, and may be renewed for one additional year. The Scholarship was worth $1,125 for the year 1999-2000, and $1,542 for 2000-01. Private school students may spend their funds on any education-related expense, including room and board.

The Washington Higher Education Coordinating Board administers the Promise Scholarship. Its overview announcing the program stated:

> To be eligible you must meet these criteria:
>
> 1. Be designated by your high school as in the top 10% of the 1999 graduating senior class.
>
> 2. Have a family income that is equal to or less than 135% of the state's median.
>
> 3. Attend an accredited public or private university, college or other accredited post-secondary institution in the state of Washington.

Davey applied for the Scholarship and was selected as a Washington Promise Scholarship recipient in August 1999. In the fall he enrolled at Northwest College, an accredited institution affiliated with the Assembly of God. Students applying to Northwest are required to indicate "a personal commitment to Jesus Christ as Lord and Savior," and the college educates students from a "distinctly Christian" point of view.

As he is a Christian who intends to become a cleric, Davey declared a double major in Pastoral Ministries and Business Management and Administration. Davey wanted to go to college, and to pursue this major, because of his religious beliefs. A Pastoral Ministries major at Northwest is designed to prepare students for a career as a Christian minister. Classes are taught from a viewpoint that the Bible represents truth and is foundational whereas, according to HECB, theology courses at public postsecondary institutions in

Washington are taught from an historical and scholarly point of view.

On October 12, 1999 HECB notified financial aid administrators throughout the state that students pursuing a degree in theology are not eligible to receive the Washington Promise Scholarship.[3] Northwest determined that majors in Pastoral Ministries are pursuing a degree in theology, so it could not certify Davey's eligibility as HECB required. As a result, Davey had to choose whether to follow his calling, or forego the Scholarship. He decided to give up the Scholarship, but has been able to pursue his major.

Davey brought this action against the Governor and officials of HECB[4] to enjoin HECB

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[3] HECB's policy is codified at Wash. Admin. Code § 250-80- 020(12). It provides:

> 'Eligible student' means a person who: (a) Graduates from a public or private high school located in the state of Washington; and
>
> (b) Is in the top ten percent of his or her 1999 graduating class; or
>
> (c) Is in the top fifteen percent of his or her 2000 graduating class; and
>
> (d) Has a family income less than one hundred thirty-five percent of the state's median; and
>
> (e) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and
>
> (f) Is not pursuing a degree in theology.

[4] The named defendants are Gary Locke, Governor of the State of Washington; Marcus S. Gaspard, Executive Director of the Higher Education Coordinating Board; Bob

from refusing to award the Scholarship to an otherwise eligible student solely because the student is pursuing a degree in theology, and for damages. He and HECB agreed to escrow Scholarship funds for the 2000-01 school year. Both parties moved for summary judgment, which the district court granted in HECB's favor.

Davey timely appealed.

II

A

The parties analyze the authorities from every possible angle. Their arguments distill to this:

On the one hand, singling Davey out for unfavorable treatment in an otherwise neutral program on account of a religious major violates the free exercise rule of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), as well as the rule of *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978), that a state offering a benefit may not impose a disability on the basis of religious status. Thus, Washington's restriction may not stand unless it is narrowly tailored to advance a compelling state interest.

Craves, Chair of the Higher Education Coordinating Board; and John Klacik, Associate Director of the Higher Education Coordinating Board. We refer to them collectively as "HECB."

On the other hand, declining to subsidize the exercise of a constitutional right is permissible under *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983). The focus in free exercise inquiries is on what the government prohibits rather than on what the individual can exact. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988). Here, Washington simply refuses to underwrite the education of students who pursue a degree in theology, but does not prohibit Davey from freely practicing or pursuing his religious views, speaking about them, or associating with others of like mind. Accordingly, strict scrutiny is inapplicable.

The rejoinder is that *Regan* and *Rust* do not apply because the programs there were set up for the government's own purposes as a speaker. As a speaker, the government may selectively fund a program to encourage activities that it believes are in the public interest. By contrast, the purpose of the Promise Scholarship program is broad: to fund the educational pursuits of outstanding students. For this reason, administration of the Scholarship must be viewpoint neutral under *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995). However, it isn't, because state policy excludes only those recipients who pursue the study of theology from a religious perspective.

We recur to basic principles. The First Amendment declares: "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof." Thus, the state may neither favor, nor disfavor, religion. A law targeting religious beliefs as such is never permissible. In *McDaniel*, for example, the Court held that a state law that disqualified members of the clergy from being delegates to a constitutional convention violated a minister's right to the free exercise of his religion. 435 U.S. at 629, 98 S. Ct. 1322. As the Supreme Court explained in *Lukumi*, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 532, 113 S. Ct. 2217.

The Free Exercise Clause "protect[s] religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542, 113 S. Ct. 2217 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148, 107 S. Ct. 1046, 94 L.Ed.2d 190 (1987) (Stevens, J., concurring in judgment)). Whereas a law that is neutral and of general applicability need not be justified by a compelling government interest even if it has the incidental effect of burdening a religious practice, a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546, 113 S. Ct. 2217 (quoting *McDaniel*, 435 U.S. at 628, 98 S. Ct. 1322, quoting *Wisconsin v. Yoder*, 406

U.S. 205, 215, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) (quotation marks omitted)); *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990).

Davey submits that HECB's policy fails *Lukumi's* neutrality test because the policy discriminates on its face by treating those who choose a religious major unequally. HECB does not dispute that Davey declared his major for religious reasons or that doing so is constitutionally protected; rather, in its view, *Lukumi* does not control because unlike the ordinances at issue there, Wash. Rev. Code § 28B.10.814 does not proscribe pursuing a degree in theology or bar only religiously motivated pursuits. The object of the ordinances invalidated in *Lukumi* was suppression of a central practice of Santeria worship, the ritualistic slaughter of animals. As HECB points out, Wash. Rev. Code § 28B.10.814 neither prohibits religious conduct nor does its application turn on the student's religious motivation. In this respect we agree with HECB that the Washington statute differs from the *Lukumi* ordinances.

However, Wash. Rev. Code § 28B.10.814 nevertheless implicates the free exercise interests articulated in *Lukumi*. Both the statute and HECB's implementing policy refer on their face to religion. The Promise Scholarship program is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit; otherwise the Scholarship is available to all secondary school graduates who have high enough grades, low enough income, and attend an

accredited college in the state. And the policy as applied excludes only those students who declare a major in theology that is taught from a religious perspective.

HECB's policy also lacks neutrality for the same reason that Tennessee's disqualification of ministers from public office, invalidated in *McDaniel*, lacked neutrality. "Minister[s] of the Gospel or priest[s] of any denomination" were barred by statute from serving as delegates to the state's constitutional convention. McDaniel, who was an ordained Baptist minister, wanted to be a delegate but the state supreme court held that the state's interest in preventing establishment of religion outweighed the guarantee of the Free Exercise Clause. The United States Supreme Court reversed. It made clear that the right to the free exercise of religion encompasses the right to be a minister, and that the clergy disqualification statute imposed an impermissible disability on the basis of religion because McDaniel could not exercise his right to be a minister and to hold office at the same time. *McDaniel*, 435 U.S. at 626, 98 S. Ct. 1322; *see Lukumi*, 508 U.S. at 533, 113 S. Ct. 2217 (opinion of Kennedy, J.) (citing *McDaniel* as rare case where law discriminates on the basis of religious status); *id.* at 557, 113 S. Ct. 2217 (Scalia, J., concurring) (observing that a law excluding members of religious organization from public benefits lacks neutrality, noting *McDaniel*).

HECB distinguishes *McDaniel* on the footing that McDaniel was prohibited from being a delegate as a result of being a minister, whereas Wash. Rev. Code § 28B.10.814 does not prohibit

Davey from pursuing a degree in theology. But this misses the point of *McDaniel:* A state law may not offer a benefit to all (there, to hold a public position; here, to hold a Promise Scholarship), but exclude some on the basis of religion (there, ministers; here, would-be ministers). Washington's restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate. A minister could not be *both* a minister *and* a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington. As the Court explained,

> [u]nder the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. . . . In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner,* 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L.Ed.2d 965 (1963).

McDaniel, 435 U.S. at 626, 98 S. Ct. 1322. The same is true here. Even though Davey (like McDaniel) was not forced to forego his religious calling, Davey's eligibility for the Scholarship, like

McDaniel's eligibility for office, was conditioned on giving up his religious pursuit.[5]

HECB asserts that Davey's reliance on *McDaniel* is also inapposite because it presumes a right to state funding for his religious exercise. HECB submits that the state has no obligation to underwrite Davey's pursuit of a religious degree, or to make it less costly, relying primarily on *Regan* and *Rust.* This is undoubtedly true in the abstract. *Regan* and *Rust* stand for the proposition that the government, as speaker or policy-maker, may selectively sponsor or pay for programs that it believes to be in the public interest, without being obliged to fund or encourage an alternative activity.[6] In *Regan,* the Court upheld denial of a tax

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[5] Justice Brennan's concurring opinion expounds both points more broadly than the plurality. As he saw it, a religious classification governing eligibility for office discriminates on the basis of belief as well as status and is "absolutely prohibited." 435 U.S. at 632, 98 S. Ct. 1322 (Brennan, J., concurring). Further, citing *Sherbert,* he wrote that in his view, the "proposition--that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment-- is also squarely rejected by precedent." *Id.* at 633, 98 S. Ct. 1322.

[6] *See, e.g., Bd. of Regents of the Univ. of Wis. Syst. v. Southworth,* 529 U.S. 217, 120 S. Ct. 1346, 146 L.Ed.2d 193 (2000) (citing *Rust* for the proposition that government may appropriate funds to advocate its own policies); *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L.Ed.2d 63 (2001) (noting that counseling activities of doctors under the federal funding program in *Rust* amounted to government speech); *Downs v. Los Angeles Unified Sch. Dist.,* 228 F.3d 1003, 1013-16 (9th Cir.2000) ("Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play

exemption (the equivalent of a subsidy) for lobbying activities of non-profit welfare organizations because it reflected a policy decision to subsidize such organizations generally and to give an extra subsidy to those that did not engage in lobbying. In *Rust*, the Court upheld regulations that limited the ability of recipients of federal grants for family-planning services to engage in abortion-related advice and activities. *See also Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) (holding that the government has no affirmative constitutional obligation to ensure that persons have the financial resources to exercise a constitutional right, there of obtaining an abortion). Even so, as the Court states in *Regan*, the government may not deny a benefit to a person because he exercises a constitutional right, 461 U.S. at 545, 103 S. Ct. 1997; and "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim [ ] at the suppression of dangerous ideas.' " *Id.* at 548, 103 S. Ct. 1997 (quoting *Cammarano v. United States*, 358 U.S. 498, 513, 79 S. Ct. 524, 3 L.Ed.2d 462 (1959), quoting *Speiser v. Randall*, 357 U.S. 513, 519, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958)). This is what makes this case different from *Rust* and *Regan*, as *McDaniel* and *Rosenberger* indicate.

In *Rosenberger*, the University authorized payment of out-side contractors for the printing

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ventriloquist"; government can decide who may speak as its representative); *cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L.Ed.2d 500 (1998) (upholding competitive grants according to subjective criteria).

costs of student publications through a Student Activities Fund, except that costs of religious activity (in connection with publications otherwise eligible for funding) would not be reimbursed. The Court distinguished this practice from the principle recognized in *Rust* and *Regan*:

> Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan* relied on a distinction based on preferential treatment of certain speakers--veterans' organizations--and not a distinction based on the content or messages of those groups' speech. The University's regulation now before us, however, has a speech-based restriction as its sole rationale and operative principle.

Rosenberger, 515 U.S. at 834, 115 S. Ct. 2510 (citations omitted). Thus, a restriction based on religion is aimed at "suppression of dangerous ideas." And "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Id.* at 830, 115 S. Ct. 2510. Therefore, once the state of Washington decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis.

HECB dismisses *Rosenberger* because the University's program there involved expressive conduct. In its view, Davey's claims do not involve public funds designated for expressive conduct, and Wash. Rev. Code § 28B.10.814 does not aim at the suppression of ideas through refusal to underwrite those ideas. We do not believe *Rosenberger* can be distinguished so readily. While the funding in *Rosenberger* did involve student *publications* (except for religious publications), funding students' *education* (except for students pursuing religious education) is not much different. Expressive conduct, creative inquiry, and the free exchange of ideas are what the educational enterprise is all about. So is pursuing a course of study of one's own choice. As the Court in *Rosenberger* observed, "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Id.* at 836, 115 S. Ct. 2510; *cf. Rust*, 500 U.S. at 199-200, 111 S. Ct. 1759 (the university is a traditional sphere of free expression that is fundamental to the functioning of our society). The disfavored viewpoint in *Rosenberger* was religion, as it is here, and the risk from state disapproval of the religious pursuits of its students is the same. In any event, to the extent that *Rosenberger's* rationale turns on the Court's treatment of funds as a limited public forum, the Court subsequently indicated in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544, 121

S. Ct. 1043, 149 L.Ed.2d 63 (2001),[7] that limited forum cases such as *Rosenberger*, *Lamb's Chapel v. Ctr. Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141, 124 L.Ed.2d 352 (1993), and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983), are instructive in subsidy cases as well. The bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral "forum" (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion. *See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S. Ct. 2093, 150 L.Ed.2d 151 (2001).

Wash. Rev. Code § 28B.10.814 is viewpoint based, and because its viewpoint is based on religion, it does discriminate against religious ideas. The Promise Scholarship program itself has a neutral purpose and is based on objective criteria. For example, the Washington legislature declared that "it regards the higher education of its qualified domiciliaries to be a public purpose of great importance to the welfare and security of this state and nation," and that "the benefit to the state [from a student financial aid program] in assuring the development of the talents of its qualified domiciliaries will bring tangible benefits to the

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[7] In *Velazquez*, the Court struck down a restriction on use of Legal Services Corporation funds, distinguishing *Rust* on the ground that Congress did not single out a particular idea for suppression because it was dangerous or disfavored, or discriminate against viewpoints on abortion, but rather prohibited Title X doctors from counseling that was outside the scope of the project. 531 U.S. at 541, 121 S. Ct. 1043.

state in the future." Wash. Rev. Code § 28B.10.800 (Notes). The Governor's congratulatory letter to Davey on his selection as a Washington Promise Scholarship recipient states that "[e]ducation is the great equalizer in our society. Regardless of gender, race, ethnicity, or income, a quality education places all of us on a more level playing field." The selection criteria are high school grades, income, and staying in Washington for college; the *de* selection criterion is pursuing a degree in theology. This has nothing to do with the purpose or point of the program. To the extent that the message behind the Promise Scholarship is that doing well in high school pays off, and that going to college in Washington is a good thing, and that developing the talents of promising students is of great importance to the state, it is qualified with the message "unless the student pursues a degree in theology from a religious perspective." This necessarily communicates disfavor, and discriminates in distributing the subsidy in such a way as to suppress a religious point of view.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988), says nothing to the contrary. HECB particularly relies on language in the opinion emphasizing that "[t]he crucial word in the constitutional text [of the Free Exercise Clause] is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Id.* at 451, 108 S. Ct. 1319 (quoting *Sherbert*, 374 U.S. at 412, 83 S. Ct. 1790 (Douglas, J., concurring)). While of course this is what the Clause says, "[w]hat the

First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990) (citing *Speiser*, 357 U.S. at 526, 78 S. Ct. 1332). More importantly, *Lyng* sheds no light on whether the government may except from a neutral program that benefits all who meet secular criteria only those who will use the benefit for a religious reason. The question in *Lyng* was whether the Free Exercise Clause prohibits the government from permitting timber harvesting in a national forest that had traditionally been used by members of American Indian tribes for religious purposes. The answer is no, essentially because the government's program was neutral and merely had an incidental effect on the tribes' religious experience with no tendency to coerce individuals into acting contrary to their religious beliefs. *Lyng*, 485 U.S. at 450-51, 108 S. Ct. 1319; *see also Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (no religious exception to drug law of general applicability); *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 90 L.Ed.2d 735 (1986) (no religious exemption from social security numbers). This is different from being directly disabled from participating in a government program on the basis of religion, a question that was addressed and resolved in *McDaniel* and *Rosenberger*.

It is also the case that here, like *McDaniel* and unlike *Rust*, *Regan* or *Lyng*, the classification *is* coercive. Grantees in the *Rust* line of cases could have their cake and eat it, too; that is, they could accept the grant and use it for the program's

restricted purpose, yet remain free to tap non-government resources for non-favored activities which could then be conducted independently. Davey cannot. If he accepts the Scholarship, he may not pursue a degree in theology (whether or not he has non-government funds to do so). If he pursues a degree in theology, he gets no Scholarship. *Cf. Federal Communications Comm'n v. League of Women Voters of California,* 468 U.S. 364, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (*Regan* not controlling because station subject to limit on editorializing in use of grant funds could not use even private funds to finance editorial activities); *Phan v. Virginia,* 806 F.2d 516, 520 (4th Cir.1986) (Virginia's refusal to fund attendance at an out-of-state religious college did not violate the Free Exercise Clause because the condition did not force Phan to choose between religious study and financial aid as in-state church-affiliated colleges with facilities to accommodate him were available). *See also Peter v. Wedl,* 155 F.3d 992, 996 (8th Cir.1998) (failure to provide spastic quadriplegic student at a religious school with paraprofessional forced choice between foregoing sectarian education or paying for paraprofessional; "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment").

In sum, Wash. Rev. Code § 28B.10.814 and HECB's policy on their face discriminate based on religious pursuit. That the effect of the classification is not to underwrite Davey's education because it includes a degree in theology does not make the classification less of a discrimination on account of viewpoint. This is not a case where a person claims that denial of a

financial benefit which is not available to others deprives him of his free exercise rights. Davey was denied a Promise Scholarship to which he was otherwise entitled solely because he personally chose to pursue a religious major. For this reason we must strictly scrutinize the restriction. *See McDaniel,* 435 U.S. at 628, 98 S. Ct. 1322; *Lukumi,* 508 U.S. at 546, 113 S. Ct. 2217.

B

HECB contends that even if, contrary to its view, a compelling interest is required, Washington's interest in not violating its own law suffices. In support, it notes that the Washington Supreme Court, and the highest courts of other states, have relied on the establishment clause in their state constitutions to reject claims that a bar on funding religious exercise violates the First Amendment.

In particular, HECB points out that the Washington Supreme Court rejected a free exercise claim quite similar to Davey's in *Witters v. State Comm'n for the Blind (Witters III),* 112 Wash.2d 363, 771 P.2d 1119 (1989) (on remand from *Witters v. Washington Dep't of Servs. for the Blind (Witters II),* 474 U.S. 481, 106 S. Ct. 748, 88 L.Ed.2d 846 (1986)). The *Witters* litigation involved a decision by the Washington Commission for the Blind to deny vocational rehabilitation assistance to a blind person who was studying at a Christian college and seeking to become a pastor. The Commission's decision was based on the Washington constitutional prohibition on use of public funds to assist an individual in the pursuit of a career or

degree in theology. It was upheld by the Washington Supreme Court, *Witters v. State Comm'n for the Blind (Witters I)*, 102 Wash.2d 624, 689 P.2d 53 (1984), but the United States Supreme Court held that extension of aid to finance a person's training at a Christian college did not violate the Establishment Clause of the First Amendment. The Court left it to the state court to consider the dictates of the Washington Constitution, which *Witters I* had characterized as "far stricter" than the federal analogue, and the Court declined to "leapfrog" consideration of those issues by holding that the Free Exercise Clause requires Washington to extend aid regardless of what the state constitution commands. *Witters II*, 474 U.S. at 489. On remand, the Washington Supreme Court held that extending aid would violate the Washington Constitution's prohibition on appropriating and applying public funds to religious instruction, and would not infringe the applicant's right to the free exercise of religion. Davey questions whether this continues to be good law, as the state supreme court has since relied on the dissent in *Witters III* in upholding state funding for religious worship so long as it passes through private hands first. *Malyon v. Pierce County*, 131 Wash.2d 779, 935 P.2d 1272 (1997). However, we assume that the Washington Supreme Court's view of the Washington establishment clause is less accommodating than the United States Supreme Court's view of the federal Establishment Clause. The real issue is whether that interest, no matter how stringently construed, is compelling enough to

outweigh a credible free exercise challenge under the federal Constitution.[8]

Following the Supreme Court's lead in *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S. Ct. 269, 70 L.Ed.2d 440 (1981), we indicated in *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n. 2 (9th Cir.1993), that a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution. In *Widmar*, the University of Missouri claimed a compelling interest in complying with the establishment provisions of the Missouri Constitution to justify exclusion of a student religious group from use of campus facilities. The Court declined to decide whether a state interest derived from its own constitution could ever outweigh the free speech interests

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[8] Other state cases to which HECB refers are not helpful on this issue. They have to do with state aid to sectarian schools rather than state aid to students who use it to pursue a nonsectarian degree. *See, e.g., California Teachers Ass'n v. Riles*, 29 Cal.3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981) (state program providing books directly to sectarian schools violated California's version of the establishment clause); *Elbe v. Yankton Indep. Sch. Dist.*, 640 F. Supp. 1234 (D.S.D.1986) (aid to sectarian schools deemed contrary to the state constitution); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Maine 1999) (Maine's policy of excluding religious schools from a tuition program paid directly to the school does violate the Free Exercise Clause); *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971) (application of funds to school districts prohibited by state's establishment clause); *Bd. of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla.1963) (transporting parochial students to Catholic school on public buses violates state constitutional bar on aid for religious education).

protected by the First Amendment, but observed that "the state interest asserted here--in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Widmar*, 454 U.S. at 276, 102 S. Ct. 269. HECB submits that *Widmar* applies only to speech restrictions in an open public forum, but there is little reason to suppose that what fails to justify the violation of one right somehow permits violation of a different right. Indeed, the Court also found that Tennessee's interest in preventing the establishment of religion did not justify that state's restriction on ministers. *McDaniel*, 435 U.S. at 628-29, 98 S. Ct. 1322. *See also Good News Club*, 533 U.S. at 113, 121 S. Ct. 2093 (rejecting federal Establishment Clause defense); *Lamb's Chapel*, 508 U.S. at 395, 113 S. Ct. 2141 (same).

The cases upon which HECB relies do not persuade us otherwise. They indicate that states may rely on their own (or the federal) establishment clause if there is *no* free exercise problem. *See, e.g., Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D.Mo.1973), *aff'd*, 419 U.S. 888, 95 S. Ct. 167, 42 L.Ed.2d 134 (1974) (mem. opinion) (concluding before *Widmar* that Missouri's interest in the separation of church and state was a compelling state interest that took care of any possible infringement of the Free Exercise Clause); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.1999)

(finding no free exercise violation and indicating that Maine's policy of excluding private sectarian schools from grants paid directly to schools was the sort of imbroglio that the Establishment Clause was meant to avoid); *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999) (holding in accord with *Strout's* free exercise analysis that school district's accommodation of child with disability did not reflect a purpose to suppress religious conduct).

We have concluded that in this case there *is* a free exercise problem. This leaves us with Washington's indisputably strong interest in not appropriating or applying money to religious instruction as mandated by its constitution, and Davey's interest in a Scholarship to which he was entitled based on the objective criteria the state set for qualification--but from which he was disabled based on his being a theology major. We believe that Washington's interest in this case is less than compelling. The Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria. It is awarded to students; no state money goes directly to any sectarian school. Scholarship funds would not even go indirectly to sectarian schools or for non- secular study unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major. *See Zelman v. Simmons-Harris*, --- U.S. ----, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002) (emphasizing importance of neutrality and individual choice in upholding voucher

program). The proceeds (approximately $1,500 in Davey's year) may be used for any education-related expense, including food and housing; application to religious instruction is remote at best. HECB does not argue otherwise. In these circumstances it is difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his Scholarship.

We hold that HECB's policy denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes his right to the free exercise of his religion. As the Court recently reiterated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Good News Club*, 533 U.S. at 114, 121 S. Ct. 2093 (quoting *Rosenberger*, 515 U.S. at 839, 115 S. Ct. 2510).

Therefore, the criterion that conditions receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective must be stricken. HECB may not rely on Wash. Rev. Code § 28B.10.814 because its classification based on religion is unconstitutional as applied through HECB's policy to Davey. Nor does the establishment clause in Washington's Constitution

excuse HECB's disabling Davey from receipt of the Promise Scholarship to which he was otherwise entitled under the program's objective criteria solely on account of his personal decision to pursue a degree in theology.

III

Given this disposition, it is not necessary to reach Davey's claims that HECB's policy abridges other constitutional rights as well. We express no view with respect to any of them except for his argument that HECB's policy violates the Washington Constitution. These issues are waived because Davey failed to argue and brief the *Gunwall*[9] factors. *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir.1999).

REVERSED.

McKEOWN, Circuit Judge, dissenting:

The majority suggests that we begin with first principles, and I do as well. The genesis of this controversy is not the Washington statute or its implementing regulations. Instead, we must start where the State of Washington began over a hundred years ago--long before it created the Promise Scholarship--when it defined its vision of

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[9] *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986) (identifying factors that Washington Supreme Court considers when determining whether state constitutional provisions are more stringent than their federal counterparts).

religious freedom as one completely free of governmental interference, a vision the State explicitly refused to taint by the influx of public monies into religious instruction. Specifically, I refer to that original provision of the state's 1889 constitution which provides that "No money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Wash. Const. art. I, § 11.

As for guiding federal principles, I likewise recognize that the First and Fourteenth Amendments circumscribe a state's ability to interfere with an individual's exercise of religion, specifically mandating that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In the State of Washington's case, it has assiduously avoided violating the first tenet of the Religion Clauses, and in doing so has not overstepped the bounds of the latter. The simple truth is that Washington has neither prohibited nor impaired Davey's free exercise of his religion. He is free to believe and practice his religion without restriction. Nor has the state prohibited Davey from exercising his right to choose among the full gamut of academic pursuits offered by Northwest College. In fact, Davey is still pursuing the same pastoral studies degree today that he claims the state prohibited him from pursuing three years ago. The only state action here was a decision consonant with the state constitution, not funding "religious ... instruction."

Davey, the majority, and I are all in the same boat in one respect--we are struggling with

where to place Davey's case on the spectrum of Supreme Court jurisprudence. In my view, the outcome of the case depends on how the question is framed. I see the question as being whether the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship. Likewise, I see the analysis as following the framework of the question. This is a funding case, not a free exercise case or a free speech case. The State of Washington, based on its constitution, made a straightforward decision not to fund a degree in pastoral studies. In other words, in an effort to maintain the separation between church and state, the state decided that it has no obligation to financially support a student to become a minister. Because I conclude, unlike the majority, that the Supreme Court's jurisprudence in the abortion funding cases guides our decision here, I respectfully dissent.

I

Before addressing the funding cases, I must first disagree with Davey that the Supreme Court's free exercise jurisprudence gives us sufficient guidance to warrant a decision in his favor.

Davey relies primarily on the Court's decisions in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993) and *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978), to argue that the State's decision not to fund religious activities impermissibly discriminates against him by (1) "singling out" students who would otherwise pursue a theology degree; and (2) forcing them to

make the difficult decision of choosing to accept funding at the expense of foregoing religious study for the first two years of post-secondary education. Those decisions simply do not support this conclusion.

As the majority here acknowledges, *Lukumi* is hardly Davey's case. There, the challenged ordinances were the rare but quintessential example of laws that directly prohibit certain religious practices. In particular, the laws at issue in that case authorized fines and even imprisonment for activities--the ritualistic slaughter of animals--that constitute a central practice of the Santeria religion. Nothing could have more clearly prohibited the church members' religious exercise than these criminal sanctions: Their choice was to practice their religion upon threat of prosecution. In contrast, Davey's decision to pursue a degree in theology carries no such ominous retribution. As a consequence, I do not find any guidance in *Lukumi* beyond the criminal ordinances at issue there as to what might constitute an impermissibly burdensome law prohibiting religious exercise.

As the Court explained in *Lukumi*, "upon even the slight suspicion that proposals for state intervention[in religious exercise] stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." 508 U.S. at 547, 113 S. Ct. 2217. Considering Washington's long-standing practice of prohibiting religious funding as a matter of *encouraging* the unfettered free exercise of religion

and the state's "hands off" approach, we should have no such suspicion of animosity in this case. The mere fact that Wash. Rev. Code § 28B.10.814 "refers on its face to religion" does nothing to satisfy the ultimate free exercise concern in *Lukumi*. Nor does the statute's focus on theology majors help discern whether legislators have impermissibly "devise[d] mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* Rather, on this record, Washington's decision not to fund religious education simply reflects its strong desire, as reflected in its constitution since ratification in 1889, to insulate itself from the appearance of endorsing religion--a concern cut from cloth wholly distinct from the pernicious distrust of the Santeria religion that clothed the city ordinances in *Lukumi*. *Compare id.* at 542, 113 S. Ct. 2217 ("The ordinances had as their object the suppression of religion.").

Neither Davey nor the majority seriously contends that either Section 11 of the Washington State Constitution or Wash. Rev. Code § 28B.10.814 was intended to suppress religion. And, because Davey was still able to pursue his chosen major in the absence of funding, he would be hard- pressed to argue that either of these provisions has the unintended effect of suppressing his religious exercise. Nevertheless, Davey argues, and the majority agrees, that the state's funding scheme imposes an unconstitutional condition upon its acceptance. They cite the Supreme Court's 1978 decision in *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978), which in turns finds support in the Court's earlier decision in

Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963). Although the majority extracts from these decisions the general proposition that a state may not offer a benefit to all to the exclusion of others on the basis of religion, neither *McDaniel* nor *Sherbert* supports such a broad prohibition on government action as to encompass its funding decisions for purposes of higher education.

To begin, *McDaniel* presented the Court with something of a unique quandary. Specifically at issue there was a provision of the Tennessee state constitution that ultimately pitted McDaniel's constitutional right to seek and hold office as a state citizen against the clergy-disqualification provisions of the state's constitution. Added on top of this was what the Court characterized as McDaniel's federal constitutional right to be a minister, thus leaving it with a multi-level constitutional dilemma: "McDaniel cannot exercise both[federal and state constitutional] rights simultaneously because the state has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' " 435 U.S. at 626, 98 S. Ct. 1322 (plurality opinion) (*quoting* 5 WRITINGS OF JAMES MADISON 288 (G. Hunt ed.1904)).

Whatever the merits or reach of the unconstitutional conditions doctrine, it is clear that its invocation in *McDaniel* came about in a situation wholly dissimilar to ours: there, the "privation of a civil right" that McDaniel's religious exercise would engender involved one of the most basic and fundamental democratic rights one could

imagine--the opportunity to directly engage in the political process. Here, on the other hand, Davey's concerns are not so weighty. Unlike *McDaniel*, this case does not juxtapose two fundamental rights. We are not talking about some constitutional right to educational funding (which, incidently, there is not, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973)); rather, we are talking about the "privation" of a scholarship--one which Davey apparently did not need, although he obviously would have appreciated, to pursue his desired major.

Perhaps most telling about the limited application of the unconstitutional conditions doctrine in the free exercise arena is the failure of Davey or the majority to seek support (except tangentially by means of *McDaniel's* explicit reliance on it)[1] [FN1] from the Court's decision in *Sherbert*. It becomes clearer upon inspection why Davey relies on this case only in passing. Specifically, *Sherbert* makes explicit that which the fractured decision in *McDaniel* only opaquely acknowledges by means of its unique facts: the unconstitutional conditions doctrine only arises in the free exercise context when the government benefit would impose a substantial burden on the potential recipient. *Sherbert*, 374 U.S. at 403-404, 83 S. Ct. 1790. No less than with *McDaniel*, a

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[1] In *McDaniel*, there was no opinion of the Court; however, a majority of Justices did agree that the rationale of *Sherbert* controlled its decision. *See* 435 U.S. at 626, 98 S. Ct. 1322 (opinion of Burger, C.J., joined by Powell, Rehnquist, and Stevens, JJ.); *id* at 633, 98 S. Ct. 1322 (opinion of Brennan, J., joined by Marshall, J.).

comparison of the facts in *Sherbert* with those here demonstrate how far Davey's case comes from falling within the scope of this doctrine.

In *Sherbert*, the Free Exercise Clause was not pitted against any sort of constitutional right; rather, at issue were unemployment compensation "benefits." The important distinction in *Sherbert*, however--which may prove to be the reason Davey does not press it here--is not what appears to be the Court's recent attempts to cabin its significance somewhere on the musty shelves of history, *see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990) (declining "to breathe into *Sherbert* some life beyond the unemployment compensation field"), but instead the nature of the choice that Sherbert had to make.

"Under the *Sherbert* test," only "governmental actions that *substantially burden* a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883, 110 S. Ct. 1595 (citing *Sherbert*, 374 U.S. at 402-03, 83 S. Ct. 1790) (emphasis added). Thus, in *Sherbert*, the Court concluded that the petitioner would shoulder a burden of unconstitutional proportions if her receipt of unemployment compensation was conditioned on working during "the Sabbath Day of her faith": "[T]o condition the availability of benefits upon [Sherbert's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U.S. at 399, 406, 83 S. Ct. 1790.

In other words, to receive the benefits to which she would otherwise be entitled, Sherbert was required to engage indefinitely in an activity that was repugnant to her faith. Again, this is hardly Davey's case--either factually or hypothetically. As a matter of fact, Davey has sustained no substantial burden; he continues to pursue his double major in Pastoral Studies and Business Management.

This brings me to a final point of distinction that may be less than explicit in the *Sherbert* decision, but should not be ignored, particularly since the Court after *Sherbert* seems to have limited its reach to the unemployment context (*McDaniel's* uniquely burdensome situation not withstanding): Sherbert not only faced a substantial burden to her religious convictions had she accepted the unemployment benefits, but she also would have potentially suffered an even worse fate had she not. After being fired from her job because of her religious convictions, Sherbert was still unable to find *any* employment for the same reason. Without the state's help, she was unable to help herself. When we consider Davey's own testimony that his decision to forego the scholarship merely led him to finding *available* after-school work to make up the difference, I cannot conclude that he faced a "substantial burden," whatever his ultimate choice.[2]

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[2] Even as described by Davey, the actual burden is indeed small. Based on his declaration, Davey would have to work only a few extra hours a week at his present job. Davey Declaration ¶ 35-37.

II

Perhaps sensing the infirm footing these free exercise cases provide, Davey reaches across the First Amendment divide, leading the majority to find support for the expansive vitality of the unconstitutional conditions doctrine in cases addressing the abridgment of speech. But, as long as we are looking beyond the free exercise arena, we should first recognize the indistinguishable similarity between this case and those that address the abortion funding cases, which conclude that the denial of funding does not "unduly burden" a woman's entitlement to have an abortion.

In my view, the abortion funding cases provide the closest analog to Davey's case. Davey has a constitutionally-protected right to exercise his religious beliefs, including a decision to be a pastoral studies major, but the state has no obligation to fund that religious pursuit, even when it has chosen to fund other educational pursuits. Likewise, a woman has a constitutionally-protected right to an abortion, but the state has no obligation to fund that right, even when it has chosen to fund other medical procedures. This result in the case of abortion is incredibly harsh, particularly for a woman who is indigent and effectively has no choice in terms of exercise of her constitutional right. Davey's case presents no parallel dilemma. The state's decision not to fund religious education does not deprive Davey of his chosen profession or his ability to practice his religion without restriction. But, if Davey is right, then perhaps he will pave the way for reconsideration of the abortion funding paradox.

"The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988) (*quoting Sherbert*, 374 U.S. at 412, 83 S. Ct. 1790 (Douglas, J., concurring)). Therefore, whether we are talking about government action that directly affects religious free exercise or does so only indirectly, the relevant inquiry must focus upon the nature of the government action and, in particular, whether it "substantially burden[s] a religious practice." *Smith*, 494 U.S. at 883, 110 S. Ct. 1595.

Much as the government may not "prohibit" or otherwise "substantially burden" the free exercise of religion without violating the Constitution, the Court has similarly characterized the right to abortion when it held that the Constitution "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977).

Significantly, for purposes of comparison to our case, the Court has held that the express denial of funding by a state for abortions does not so burden that right--even when the individual is indigent or otherwise qualified for medical benefits:

> The [state regulation prohibiting abortion funding] places no obstacles absolute or

otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. *The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.* The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the [state's] regulation.

Id. at 474, 97 S. Ct. 2376 (emphasis added); *see also Harris v. McRae*, 448 U.S. 297, 316, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980) (no unconstitutional burden even when woman would terminate pregnancy for health reasons). I can discern no difference here. In Davey's case, the State of Washington may have made the pursuit of a non-theology degree more attractive by virtue of the scholarship award, but at the same time has not "burdened" Davey by making the pursuit of his chosen degree any more difficult than it would have been in the absence of this funding. Consequently, no less than "the constitutional freedom recognized in [*Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973),] and its progeny," the freedom to exercise one's religion should not "prevent [Washington] from making a value judgment favoring [the funding of non-theology degrees] over [theology degrees], and ... implement[ing] that

judgment by the allocation of public funds." *Harris*, 448 U.S. at 314, 100 S. Ct. 2671 (internal quotation marks and citations omitted).

Whether these abortion cases will maintain their vitality over time, they represent an inescapable conclusion as to the lack of a burdensome effect of funding decisions, a conclusion that should have even more purchase in the context of the Religion Clauses. I say this because the Court's decisions in the abortion cases, and particularly in *Maher*, which addressed the funding decisions of state legislatures, appear to rest upon a sensitivity to the difficult policy choices states must make between competing and significant interests:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Maher, 432 U.S. at 475, 97 S. Ct. 2376. Thus, in the context of medical welfare, the Court was even willing to endorse the legislature's decision to *encourage* benefit recipients to choose childbirth *over* abortion by effectively making it the less expensive and more readily available alternative for indigent women. Of course, in Davey's case, we need not even conclude that the state was attempting to influence such a controversial choice

if we uphold Washington's decision not to have its taxpayers' dollars used for religious purposes.

Unlike the abortion cases, there is no suggestion here that the State of Washington is actively attempting to encourage--as a matter of public policy or otherwise--Davey or others like him to pursue a purely secular education. Indeed, the scholarship may be used at a religious college. Instead, the indisputable driving force behind § 28B.10.814 and Section 11 of the Washington State Constitution is the state's strong prophylactic interest in steering clear of endorsing or supporting religion through direct funding of religious pursuits--regardless of the various religious paths its citizens may freely choose to pursue on their own. Certainly if the Court is willing to conclude that funding decisions do not impose a substantial burden even when they represent a legislature's desire to encourage one choice over another, we must conclude that they do not impose such a burden when, as here, the state's allocation of resources is guided by a wholly separate concern than a preference of which choice the recipient makes.

III

As I have noted, Davey and the majority take a decidedly different tack as they race around the free exercise jurisprudence to the seemingly safe harbors of *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995), and the free speech cases. Whatever nirvana the expansive public forum doctrine may seem to provide, it cannot be

stretched to cover Davey's claims. As attractive as *Rosenberger* may be insofar as it involves funding decisions in an educational setting, Davey's is not a free speech case, or at least has not been treated (and in my view, correctly so) as such by the majority. More explicitly, the decision not to fund Davey's pursuit of a pastoral ministry degree does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*.

The underlying rationale for the general prohibition on content discrimination is the concern that it "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L.Ed.2d 476 (1991). Thus, the argument can at least be made, as it was in *Rosenberger*, that the failure to fund a religious publication might impermissibly limit students' access to a full panoply of intellectual perspectives, an important concern in the university setting. *See Rosenberger*, 515 U.S. at 835, 115 S. Ct. 2510 (danger is "chilling of individual thought and expression" which "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"). But to extend this argument to the failure to fund Davey's pursuit of a theology degree would stretch the viewpoint rationale to the breaking point of credulity.

Whereas the funding decision in *Rosenberger* directly affected the vehicle of a viewpoint's dissemination, i.e., an actual publication, there can

be absolutely no concern here that the State of Washington has precluded, will preclude, or is even likely to preclude Davey from being exposed to the pervasively Christian perspective that permeates every aspect of his educational experience at Northwest College. In particular, Washington has done nothing to impede Northwest from disseminating its decidedly religious viewpoint.

Whether Davey chooses to pursue a theology degree or a business management degree or any other degree, he will undoubtedly be exposed to a "concept of education" and a viewpoint that Northwest itself describes as "distinctively Christian in the evangelical sense." Northwest College Mission Statement, http://www.nwcollege.edu/about/mission.html (as submitted in Davey's excerpts of record and viewed on June 15, 2000). Whether or not Davey studies to be a minister, he will participate in an educational experience at an institution whose mission "is to provide, in a distinctly evangelical Christian environment, quality education to prepare students for service and leadership." *Id.* And no matter what degree Davey pursues, Northwest assures him that his educational experience will "develop the whole person through general studies integrated with biblical knowledge." *Id.* To make no mistake about it, Northwest ensures its students that it

> seeks to relate biblical Christianity to every area of life, both on and off campus: to academic disciplines, to co- and extracurricular activities, in the residence halls, in the local community, and in one's

> personal life. It assumes that all members of the Northwest community desire meaningful involvement in the process of Christian higher education as they seek to express their faith in the context of an Assemblies of God college. Faculty and staff members commit themselves to be facilitators and learners in this educational endeavor. Students, by enrolling, join with them in accepting the responsibilities of membership in this community.

Id.

No aspect of Washington's scholarship program chills Davey's "individual thought and expression." *Rosenberger*, 515 U.S. at 835, 115 S. Ct. 2510. The State of Washington has simply decided not to fund Davey's training as a minister, and in no way can this decision be perceived as one that might "effectively drive certain ideas or viewpoints from the marketplace," particularly from Northwest's uniquely Christian "marketplace." In sum, the viewpoint concerns raised in *Rosenberger* are simply unfounded in this case.

To the extent that Davey's case is, nevertheless, "not much different" from the speech cases, majority op. *supra* at 756, it cannot be because it presents the same sort of speech concerns implicated in *Rosenberger*. Rather, it must be because the refusal to fund Davey's religious studies somehow imposes a wholly distinct burden on his free exercise right; in other words, it returns us back to Davey's initial

complaint that the State has unconstitutionally conditioned the receipt of its benefits, which leads me to reiterate that Davey is free to use his scholarship at a religious institution. He is absolutely free to discuss religion and study it for purposes of becoming a minister. He suffers no disadvantage as a consequence of the State's decision to fund other educational pursuits. Davey is just as reliant on private sources of aid for his education as he was before he applied for the scholarship funds.

Nonetheless, the majority concludes that Washington has prohibited Davey's free exercise of religion, or more accurately that the State has attempted to suppress "dangerous ideas," maj. op. *supra* at 755, despite the clear and consistent message in its constitution that the citizens of Washington are more concerned about the potentially dangerous distortion that the state funding of religious activities might create, not the suppression of ideas, dangerous or otherwise. Nothing in this statutory scheme implicates Davey's ability to express his beliefs. If such is the result of a decision to fund certain activities to the exclusion of others (that is, if funding decisions somehow coerce an individual's free exercise of religion), then I cannot see how the rationale of the abortion funding cases can survive. As expressed by the Supreme Court, the freedom to exercise the choice of religion cannot be distinguished from the freedom to exercise the choice between childbirth and abortion. Therefore, if the "bottom line," as the majority suggests is that the funding/forum distinction does not end at the frontier of free speech and concerns about viewpoint

discrimination, maj. op. *supra* at 756, then it must at least reach to the abortion context where that right has been characterized in exactly the same fashion as that concerning the free exercise of religion.

IV

In the Court's most recent pronouncement in the religion arena, *Zelman v. Simmons-Harris*, --- U.S. ----, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002), Justice Thomas specially concurred to express his opinion that "state action should be evaluated on different terms [in the context of the Establishment Clause] than similar action by the Federal Government," concluding that federal courts should "strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other." *Id.*, 122 S. Ct. at 2481 (Thomas, J., concurring). Concededly, Justice Thomas was suggesting that states should be allowed more constitutional freedom to experiment with involvement in religion, *id.*, but I cannot conclude that such federalism concerns should represent a one-way street when it comes time for a state to decide whether to enter into the ill-defined terrain of the Establishment Clause's jurisprudence.

No less than the State of Ohio's decision to fund students' sectarian education, which the Court endorsed in *Zelman*, the State of Washington's decision not to "experiment" in the funding of religious indoctrination should represent an equally valid concern--both as a matter of federalism and with respect to the more explicit

limitations of the Religion Clauses. Thus, in the absence of a more substantial burden than this decision has placed on Davey's choice of study, I conclude that Washington has successfully navigated the tensions between the free exercise of religion and the prohibition of its endorsement when, at the time of statehood, it decided to refrain from funding religious instruction. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OCT 26 2000
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRIT OF
WASHINGTON
BY DEPUTY

JOSHUA DAVEY,

Plaintiff,

v.

GOVERNOR GARY LOCKE, individually and in his official capacity, et al.,

Defendants.

No. C00-61R

ORDER

THIS MATTER comes before the court on Joshua Davey's challenge to the decision of defendants Gary Locke, Governor of Washington, Marcus Gaspard, Executive Director of the Higher Education Coordinating Board, Bob Craves, Chair of the Higher Education Coordinating Board, and John Klacik, Associate Director of the Higher Education Coordinating Board (hereinafter collectively referred to as "HECB" unless individually identified),

preventing him from using state scholarship funds to pursue religious instruction. Both parties have moved for summary judgment on Davey's claims that HECB's decision violated the state and federal constitutions. Having reviewed the pleadings filed in support of and in opposition to the motions, together with the relevant files, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

The succeeding undisputed facts were originally reported in the court's order on Davey's motion for preliminary injunction. In 1999, Governor Gary Locke created the Washington Promise Scholarship to facilitate college attendance by low to middle income students from Washington who ranked among the top 10% of their high school class. The Scholarship's value depends on the level

of funding and the number of qualifying applicants. For the 1999-2000 school year, the Scholarship was worth $1,125. Under the terms of the Scholarship, students must enroll in an accredited four-year institution in order to be eligible. The Scholarship funds are sent directly to the qualifying student's school and held in his or her name. The student's institution must certify that the student is enrolled and eligible for aid before any funds may be released. All funds are to be put towards the student's educational expenses.

In 1999, Davey applied for and was awarded the Scholarship. He received a letter confirming his eligibility from defendant Gaspard in August of 1999, and an award certificate and congratulatory letter from Governor Locke in October of 1999. Davey proceeded to enroll in the Northwest College

("Northwest"), a "Christian community of faith and learning" located in Kirkland, Washington, and declared a double major in Pastoral Ministries and Business Management.

Later in October of 1999, Northwest's financial aid director, Lana Walters, received a memorandum from defendant Klacik informing her that, pursuant to RCW 28B.10.814 and the state constitution, "students who are pursuing degrees in theology are not eligible to receive *any* state-funded student financial aid, including the new Washington Promise Scholarship." Davey Decl. in Support of Motion for Preliminary Injunction, Exh. H (emphasis in original). That memorandum was accompanied by the certification form required from Northwest prior to release of funds to Davey. That certification itself required Northwest to affirm that "no student

[receiving the Scholarship] is pursuing a degree in theology."

Davey was informed of this policy and that, if he pursued a degree in theology, the Scholarship would not be available to him. He adhered to his decision to pursue his chosen career. As a result, no Scholarship funds have been released to him.

Davey initially sought a preliminary injunction from this court ordering HECB to reinstate his Scholarship. The court denied that request by order dated March 17, 2000. Davey now moves for summary judgment on his claims that Washington state's statutory and constitutional prohibitions on the use of state funds for religious instruction violate rights secured by the First and Fourteenth Amendments to the U.S. Constitution, and Article 1, §§11 and 5 of the state constitution.

HECB has moved for summary judgment dismissing each of these claims.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The parties agree that there are no disputed issues of material fact, and that this matter is appropriate for resolution by summary judgment. Based on a careful review of the record and applicable authority, the court finds that HECB is entitled to judgment as a matter of law and to dismissal of each of the claims in Davey's complaint.

B. Washington State Constitution

1. Article 1, section 11

Davey claims that denying him scholarship funds because he intends to pursue a degree in theology violates the right to free exercise of religion guaranteed by Article 1, §11 of the Washington State Constitution. HECB claims that this very constitutional provision prevents awarding him a scholarship for that purpose.[1]

Article 1, §11 provides that

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship shall be guaranteed to every individual, and no one shall be molested or disturbed in person or

[1] HECB also correctly argues that RCW 28B.10.814 prevents the aid at issue. RCW 28B.10.814 provides that "[n]o state aid shall be awarded to any student pursuing a degree in theology." Davey does not dispute that this statute expressly applies to his case, but claims that the state statutes must bow to the requirements of the Washington State and United States Constitutions. The validity of RCW 28B.10.814 is thus implicitly addressed in the court's discussion of the applicable state and federal constitutional provisions. *See infra*, §§II.B and C. It suffices to say here that the statute passes muster if there has been no violation of Davey's state or federal constitutional rights.

> property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Wash. const. Art. 1, §11 (1889). Davey relies on the freedom of conscience portion of §11 to argue that HECB must allow him to use Promise Scholarship funds to pursue religious instruction as an expression of his beliefs. HECB, in turn, relies on the constitutional prohibition on the expenditure of public money for religious purposes to justify its decision.

The Washington State Supreme Court was presented with facts substantially similar to the instant case in *Witters v. State Comm'n for the Blind*, 102 Wash.2d 624 (1984), *rev'd and remanded sub nom., Witters v. Washington Dept. of Services for the*

Blind, 474 U.S. 481 (1986) ("*Witters I*"). Plaintiff Witters was a visually impaired student who applied for aid under a state vocational rehabilitation program in order to attend a private bible college. Witters' ultimate goal was to become a pastor, missionary, or church youth counselor. The Commission for the Blind denied his request based on its policy, which relied on the state constitution, that forbids the use of public funds "in the pursuit of a career or degree in theology or related areas." Witters claimed that his chosen course of study was religiously compelled, and he appealed from that administrative decision on First Amendment grounds. The case eventually reached the state supreme court, which determined that state aid for such religious training was constitutionally prohibited under the First Amendment's

Establishment Clause. *Witters I*, 102 Wash.2d at 630. On certiorari, the United States Supreme Court applied the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and held that the aid to Witters would not run afoul of the Establishment Clause. *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 489 (1986) ("*Witters II*"). The Court remanded the case, however, to allow the state supreme court to further analyze the state constitution and to decide whether Washington's "far stricter" establishment clause prevented the aid sought. *Id.* (declining Witters' "invitation to leapfrog consideration [of Washington's Constitution] by holding that the Free Exercise Clause *requires* Washington to extend vocation rehabilitation aid to petitioner regardless of what the State Constitution commands") (emphasis in original).

On remand, the state supreme court held that aid to Witters was indeed prohibited by the state constitution. The court interpreted Article 1, §11 to "prohibit[ ] the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." *Witters v. State Comm'n for the Blind*, 112 Wash.2d 363, 365, *cert. denied*, 493 U.S. 850 (1989) ("*Witters III*"). Although the United States Supreme Court had held that the aid was permissible under the Establishment Clause, the *Witters III* court observed that there is a "major difference" between the state and federal constitutions. *Id.* at 370. That major difference lay in the fact that the state's establishment clause was more restrictive on governmental funding than the

federal provision. The court, therefore, affirmed the Commission's decision.

Although the state supreme court's interpretation of the federal Establishment Clause was reversed, its interpretation of its own constitution remains intact. The Supreme Court intimated that Washington's constitution may be a more stringent barrier to state funding of religious education. The Court also declined to review the *Witters III* decision after remand. *Witters III*, 493 U.S. 850. Because the Washington Constitution prohibits the funding of religious instruction, both by its express terms and as interpreted by the state's highest court, HECB is entitled to judgment as a matter of law on Davey's Article 1, §11 claims. *See also Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash.2d 912 (1967) ("There can be no

doubt that our constitutional bars are absolute against [state funding of] religious instruction and indoctrination in specific religious beliefs or dogma . . . i.e., instruction that is devotional in nature and designed to induce faith and belief in the student.").

Nevertheless, Davey has argued extensively that the *Witters* line of cases was implicitly overruled in *Maylon v. Pierce County*, 131 Wash.2d 779 (1997). In *Maylon*, the Washington Supreme Court rejected an Establishment Clause challenge to the Pierce County Sheriffs Department chaplaincy program. The volunteer chaplains were provided by a sectarian organization, but generally provided secular counseling and support services to officers and to the community. The *Maylon* court concluded that Pierce County's decision to underwrite the unpaid chaplains' services by providing radios,

insignia, and use of county vehicles did not run afoul of the Establishment Clause or the Washington Constitution. However, *Maylon* involved a situation where no taxpayer money was being appropriated for religious purposes. Unlike *Maylon*, in this case roughly $1,125 of taxpayer money would be explicitly devoted each year to Davey's religious instruction. Although Davey characterizes this as a "lame" distinction, this court notes that the *Maylon* court found this distinguishing fact to be "the singularly most important undisputed fact of all." *Id.* at 786.

2. Article 1, section 5

Davey alleges that the state's refusal to allow him to apply the Promise Scholarship towards religious education violates the free speech clause of the Washington Constitution. Article 1, §5 of the Washington State Constitution provides that "[e]very

person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Noting that this constitutional provision requires viewpoint neutrality in any speech regulation, Davey attempts to cast HECB's funding decision as a time, place or manner restriction on his expression, and claims that HECB's policy is facially over broad and discriminates on the basis of viewpoint.

Davey's free speech analysis is fundamentally flawed. He fails to identify the speech or expressive conduct being regulated – nor could he do so. Neither the HECB policy nor RCW 28B.10.814 regulate speech. In spite of HECB's decision, Davey can still speak freely – he just cannot demand that Washington pay for him to do so. The court finds that HECB's policy, which is based on RCW

28B.10.814, does not represent a restriction on speech that implicates Article 1, §5 of the state constitution.

C. United States Constitution

1. First Amendment Free Exercise of Religion Clause

Davey claims that HECB's decision to deny educational funding infringed on his right to freely exercise his religion by limiting his ability to pursue a career in the ministry. HECB argues that they are not preventing Davey from pursuing his religious aspirations, but simply refusing to fund those pursuits.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. "The crucial word in the constitutional text is 'prohibit:' '[f]or the Free

Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Lyng v. Northwest Indian Cemetery Prot. Assoc.*, 485 U.S. 439, 451 (1988) (denying Native American tribes' claim that decision to harvest timber and build roads on federal land, traditionally used by tribes for sacred religious rituals, amounted to Free Exercise violation) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)). *See also Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) (holding "that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny").[2]

[2] Davey claims that this reasoning from *Regan* does not apply in light of *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). That case centrally involved students' free speech rights in a public forum and, being wholly distinguishable on its factual and legal contexts, is not controlling of the instant case. *See infra*, §II.C.3.

Thus, while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits.

There is no dispute that HECB has not prohibited Davey from studying pastoral ministries. Davey claims that the distinction between prohibiting conduct and refusing funding was rejected by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), and points to Justice Douglas' *Sherbert* concurrence, quoted in *Lyng*, *supra*, which stated that those "considerations . . . are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-Day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church, but no more so

than does the salary of any public employee." *Sherbert*, 374 U.S. at 412-13.

Davey's attempt to bring this case under the *Sherbert* line of cases fails for two reasons. First, the *Lyng* majority relied only on Justice Douglas' observation that the crux of the Free Exercise Clause is governmental prohibition of religious activity. *Lyng*, 485 U.S. at 451. It was the truncated version of Justice Douglas' concurrence quoted in *Lyng*, and on which HECB relies, that was adopted by a majority of the Supreme Court.

Moreover, the Supreme Court has recognized the limitations of *Sherbert* and its progeny, and consistently refused to apply those holdings outside of the unemployment compensation arena. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 884 (1990) (limiting *Sherbert*

and succeeding cases to "stand for the proposition that where the State has in place a system of individual [hardship] exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). *Smith* involved two members of the Native American Church who were terminated by their employer for consuming peyote, a controlled substance, in the course of their religious exercises. Both applied for, and were denied, unemployment benefits from the Oregon Department of Human Resources on the grounds that they were terminated for work-related misconduct. Refusing to apply the *Sherbert* line of cases, the *Smith* court rejected petitioners' argument that the Free Exercise Clause prevented enforcement of Oregon's criminal restriction of peyote, and held that religion-based conduct is *not* entitled to a Free Exercise exception to

generally applicable regulations. Indeed, the *Smith* Court determined that the compelling interest test formerly common in First Amendment jurisprudence would only be applied in *Sherbert's* limited factual context. *Id.* at 883-85.

Neither does Davey's heavy reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), advance his claim. In *McDaniel*, the Supreme Court struck down a portion of the Tennessee Constitution that prevented "ministers of the Gospel or priest of any denomination" from serving as delegates to the state's constitutional convention. Relying on *Sherbert*, 374 U.S. 398, the *McDaniel* Court held that Tennessee could not condition the petitioner's right to the free exercise of his religion on the surrender of his right to seek office. *McDaniel*, 435 U.S. at 626. Like each of his other constitutional arguments,

Davey's reliance on *McDaniel* mistakenly presumes that he has a right to have Washington fund his religious instruction. He does not, and *McDaniel* in no way leads to the opposite conclusion.

2. First Amendment Establishment of Religion Clause

Davey claims that he was denied educational aid in violation of the Establishment Clause of the First Amendment. He relies on *Agostini v. Felton*, 521 U.S. 203 (1997), for the proposition that the state policy against his use of Scholarship funds for religious education has the effect of inhibiting religion, and that this violates the Constitution's Establishment Clause. Citing *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127 (Maine, 1999), *cert. denied*, 120 S. Ct. 364 (1999), HECB argues that the Establishment Clause is only directed at governmental acts *in support of* religion. Indeed,

Agostini answered the question of whether New York could permissibly provide financial support to sectarian schools under a neutrally applicable funding scheme, not whether New York was *required* to provide such aid to sectarian institutions. The court agrees with the Maine Supreme Court's observation that the Establishment Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." *Bagley*, 728 A.2d at 136. The court rejects Davey's claim that the Establishment Clause requires Washington to fund his religious education.

3. First Amendment Free Speech and Association Clause

Davey claims that his freedom of speech was abridged by the state's failure to fund his education

at Northwest College because 1) Northwest is within the ambit of the First Amendment when it teaches theology to its students; 2) the First Amendment protects the rights of both speakers and listeners; and 3) the First Amendment also protects symbolic communicative acts.

Again, Davey chose to ignore the distinction between his constitutionally-protected right to freedom of speech and association, and a non-existent right to compel the state to subsidize these rights. He simply cannot identify any restriction on his freedom to speak and has no basis for *requiring* the state to fund the exercise of his First Amendment rights. Although Washington decided not to fund Davey's expression of his religious ideals, it certainly placed no obstacle or other restriction on that expression. Moreover, even if his decision to pursue

religious training in the face of losing the Scholarship was symbolic speech challenging HECB's policy, the conduct being restricted is not his ability to disagree with the HECB policy, nor his right to declare a major of his choosing. The conduct being restrained is his use of state funds to prepare to enter the clergy.

Nevertheless, Davey argues that he has free speech interests at stake because the Washington Promise Scholarship created a limited public forum, and that once such a forum is created, the state may not discriminatorily deny access to the forum on content or viewpoint grounds. The Supreme Court has held that the government creates a limited public forum when it subsidizes private speech using a generally applicable and neutral funding scheme. *Rosenberger v. Rector and Visitors of University of*

Virginia, 515 U.S. 819 (1995). *Rosenberger* involved a University of Virginia program that paid the private printing costs for student-run journalistic publications out of its student activities fund. The University attempted to withhold funding for a particular student newspaper because it "primarily promotes or manifests a particular belie[f] in or about a deity or ultimate human reality." *Id.* at 823 (alterations in original). The petitioning students claimed that exclusion of their theological viewpoint was a violation of their freedom of speech. The Court held that, by adopting a generally available funding program for the purpose of supporting private student speech, the University created a "metaphysical" public forum that prevented it from denying access on discriminatory grounds focusing on the content or viewpoint of the students'

expression. *Id.* at 830. The Court also rejected the University's argument that the central issue was not denial of access to facilities, but rather permissible denial of funding. *Id.* at 832-35.

Rosenberger is inapposite to the present case. The Promise Scholarship does not create a public forum.[3] The purpose of the Scholarship was not to subsidize student speech or to invite expression of a diversity of viewpoints, but simply to pay for educational expenses. That distinction alone dooms Davey's claim. In addition, the Promise Scholarship is not generally available, and Davey's viewpoint is not singled out for disfavored treatment. Instead, availability of the Promise Scholarship is expressly limited by the constitutional, statutory and HECB

[3] Because the court finds that no manner of public forum was created in this case, it need not address Davey's arguments relying on *Widmar v. Vincent*, 454 U.S. 263 (1981).

policy provisions that prohibit use of state funds to pursue religious education. Moreover, Davey's religious viewpoint is immaterial to the operation of the constitutional and statutory bar on the expenditure of state funds; under applicable Washington law it simply does not matter *which* ministry Davey chose to pursue, because all religious pursuits are equally ineligible. Davey has not demonstrated that a public forum was created, and *Rosenberger* does not apply to the case at bar.

Davey also claims that his First Amendment right to free association has been violated by being denied the Promise Scholarship. He describes the Northwest College community as an expressive association that aims to learn and transmit Christian values and knowledge. Plaintiff's Memorandum in Support of Summary Judgment at

14. It is not disputed that the right to freedom of association is a necessary correlate to the constitutionally protected right to freedom of speech, *see Roberts v. United States Jaycees*, 468 U.S. 609 (1984), or that the government may unconstitutionally abridge that freedom of association if it intrudes into the internal structure or affairs of an association. *Boy Scouts of Amer. v. Dale*, __ S. Ct. __, 2000 WL 82694, *4 (2000).

Davey presents no evidence indicating that Washington has interfered with the internal structure or affairs of Northwest College. Rather, Davey claims that his right to freedom of association was violated because he had to work a few extra hours per week, instead of spending those hours in "study, investigation and worship with his fellow students." Plaintiff's Memorandum in Support of

Summary Judgment at 14. This *de minimis* burden is wholly insufficient to make out a claim on First Amendment grounds. Washington has enacted no law that would prevent Davey from seeking out and enjoying the companionship of any of his classmates, or that would prevent Northwest College from freely structuring its affairs. Davey's right to free association does not encompass a right to have the state subsidize his religious education in order to free him of the real world obligations of supporting himself during school. Even construing all facts in the light most favorable to him, Davey's free association claim lacks merit.

4. Fourteenth Amendment Equal Protection Clause

Davey claims that he was denied scholarship aid in violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection

Clause requires that people similarly situated receive equal treatment under the law. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1977). Davey claims that, under *Cleburne*, HECB's decision "impinge[d] on [his] personal rights protected by the Constitution," and that the decision may stand only if defendants offer a compelling state interest. Plaintiff's Memorandum in Support of Summary Judgment at 8, *citing Cleburne*, 473 U.S. at 440. Davey's statement of the law is correct, but his claim founders on the fact that none of his constitutional rights were abridged.

That notwithstanding, Davey claims that there may be a deprivation of Equal Protection where a state statute treats similarly situated individuals differently based on criteria wholly unrelated to the objective of the statute, relying on

Reed v. Reed, 404 U.S. 71 (1971). On this score, Davey's analysis is confused. He claims that Washington's prohibitions on the use of state funds to support religious instruction are unrelated to the objective of the Promise Scholarship, which is to prepare Washingtonians to "meet the challenges of the 21st century." However, it is not the Promise Scholarship's purpose that is relevant under *Reed*, but rather the purpose of RCW 28B.10.814. The purpose of that statutory provision is to prevent violation of the state constitution's establishment clause, and Washington's statutory treatment satisfies *Reed's* requirement that it be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed*, 404 U.S. at 76

(quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)).

5. Vagueness Under the Fourteenth Amendment

Davey claims that the HECB policy against using state funds to pursue a degree in theology is an unconstitutionally vague restriction of his speech. A law is void for vagueness if it 1) leaves the public guessing as to what it means; or 2) invites arbitrary and discriminatory enforcement by allowing unbridled discretion in its enforcement. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Davey has failed to show that either prong of the *Grayned* test is violated in the instant case. The import of HECB's policy and RCW 28B.10.814 is abundantly clear.[4]

[4] The court also notes that neither Davey nor Lana Walter, the Financial Aid Administrator at Davey's chosen college, had any difficulty understanding just what it means to prohibit the use of state funds to pursue a degree in theology.

Any ambiguity in the term "pursue" or the phrase "a degree in theology" is lifted when the policy and statute are read in light of the state constitution's restriction on support to any religious worship, exercise or instruction.

Nor does the policy allow unbridled discretion. The prohibition on use of state funds to pursue a degree in theology is absolute, and there is no room reserved for individual determination. While the state may have delegated to school officials the duty of determining when a student is pursuing a degree in theology, this in itself does not imply an exercise of unbridled discretion. Rather, the delegation of that duty avoids entangling the state in determining what is and what is not religious worship, exercise or instruction. For these reasons, the court rejects Davey's vagueness argument.

III. CONCLUSION

For the reasons detailed above, the court hereby DENIES Davey's motion for summary judgment, and GRANTS HECB's motion for summary judgment. As a matter of law, HECB is entitled to complete dismissal of Davey's complaint.

DATED at Seattle, Washington this 5th day of October, 2000.

// signed //
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 26 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOSHUA DAVEY,

Plaintiff-Appellant,

v.

GARY LOCKE, Gov., individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Defendants-Appellees.

No. 00-35962

D.C. No. CV-00-00061-BJR

ORDER

Before: RYMER, McKEOWN, and GOULD, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judge McKeown voted to grant the petition for rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to hear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Washington Constitution
Article I, Religious Freedom

§ 11 – Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Wash. Laws of 1999, ch. 309

NEW SECTION. **Sec. 611. FOR THE HIGHER EDUCATION COORDINATING BOARD—FINANCIAL AID AND GRANT PROGRAMS**

General Fund—State Appropriation (FY 2000)	$ 106,945,000
General Fund—State Appropriation (FY 2001)	$ 117,807,000
General Fund-Federal Appropriation	$ 2,422,000
Advanced College Tuition Payment Program Account—State Appropriation	$ 3,408,000
TOTAL APPROPRIATION	$ 230,582,000

The appropriations in this section are subject to the following conditions and limitations:

. . . .

(6) $103,686,000 of the general fund—state appropriation for fiscal year 2000 and $114,700,000 of the general fund—state appropriation for fiscal year 2001 are provided solely for student financial aid, including all administrative costs. Of these amounts:

. . . .

(i) $2,800,000 of the general fund—state appropriation for fiscal year 2000 and $6,200,000 of the general fund—state appropriation for fiscal year 2001 are provided solely to establish the Washington promise scholarship program subject to the following conditions and limitations:

(i) Within available funds, the higher education coordinating board shall award scholarships for use at accredited institutions of higher education in the state of Washington to as many students as possible from among those qualifying under (iv) and (v) of this

subsection. Each qualifying student will receive two consecutive annual installments, the value of each not to exceed the full-time annual resident tuition rates charged by community colleges.

(ii) Of the amounts provided, no more than $250,000 each year is for administration of the Washington promise scholarship program.

(iii) The Washington's promise scholarship account is created in the custody of the state treasurer. The account shall be a discrete nonappropriated account. Other than funds provided for program administration, the higher education coordinating board shall deposit in this account all money received for the program. The account shall be self-sustaining and consist of funds appropriated by the legislature for these scholarships, private contributions, and receipts from refunds of tuition and fees.

(iv) Seniors in the top ten percent of their individual Washington state high school class in 1999 and whose family income does not exceed one hundred and thirty-five percent of the state's median family income, adjusted for family size qualify for a scholarship in fiscal year 2000.

(v) Seniors in the top fifteen percent of their individual Washington state high school class in 2000 and whose family income does not exceed one hundred thirty-five percent of the state's median family income, adjusted for family size qualify for a scholarship in fiscal year 2001.

(vi) For students eligible under subsections (iv) and (v) of this subsection, the superintendent of public instruction shall provide the higher education

coordinating board with then names, addresses, and unique numeric identifiers of students in the top ten percent, or top fifteen percent, as appropriate in each of the respective high school senior classes in Washington state. This shall be provided no later than August 1 of each year.

(vii) Scholarships awarded under this section may only be used at accredited institutions of higher education in the state of Washington for college-related expenses, including but not limited to, tuition, room and board, books, materials, and transportation. The Washington promise scholarship award shall not supplant other scholarship awards, financial aid, or tax programs related to postsecondary education. Scholarships may not be transferred or refunded to students.

(viii) The higher education coordinating board shall evaluate the impact and effectiveness of the Washington promise scholarship program. The evaluation shall include, but not be limited to: (A) An analysis of other financial assistance promise scholarship recipients are receiving through other federal, state, and institutional programs, including grants, work study, tuition waivers, tax credits, and loan programs; (B) an analysis of whether the implementation of the promise scholarship program has had an impact on student indebtedness; and (C) an evaluation of what types of students are successfully completing high school but do not have the financial ability to attend college because they cannot obtain financial aid or the financial aid is insufficient. The board shall report its findings to the governor and the legislature by November 1, 2001.

(ix) The higher education coordinating board may adopt rules as necessary to implement this program.

Wash. Rev. Code 28B.10.814
State student financial aid program – Theology student denied aid.
No aid shall be awarded to any student who is pursuing a degree in theology.

Wash. Rev. Code 28B.119.005
Intent – Finding.
The legislature intends to strengthen the link between postsecondary education and K-12 education by creating the Washington promise scholarship program for academically successful high school graduates from low and middle-income families. The legislature finds that, increasingly, an individual's economic viability is contingent on postsecondary educational opportunities, yet the state's full financial obligation is eliminated after the twelfth grade. Students who work hard in kindergarten through twelfth grade and successfully complete high school with high academic marks may not have the financial ability to attend college because they cannot obtain financial aid or the financial aid is insufficient.

Wash. Rev. Code 28B.119.010
Program design – Parameters.
The higher education coordinating board shall design the Washington promise scholarship program based on the following parameters:

(1) Scholarships shall be awarded to students graduating from public and approved private high schools

under chapter 28A.195 RCW and students participating in home-based instruction as provided in chapter 28A.200 RCW who meet both an academic and a financial eligibility criteria.

(a) Academic eligibility criteria shall be defined as follows:

(i) Beginning with the graduating class of 2002, students graduating from public and approved private high schools under chapter 28A.195 RCW must be in the top fifteen percent of their graduating class, as identified by each respective high school at the completion of the first term of the student's senior year; or

(ii) Students graduating from public high schools, approved private high schools under chapter 28A.195 RCW, and students participating in home-based instruction as provided in chapter 28A.200 RCW must equal or exceed a cumulative scholastic assessment test I score of twelve hundred on their first attempt or must equal or exceed a composite American college test score of twenty-seven on their first attempt.

(b) To meet the financial eligibility criteria, a student's family income shall not exceed one hundred thirty-five percent of the state median family income adjusted for family size, as determined by the higher education coordinating board for each graduating class. Students not meeting the eligibility requirements for the first year of scholarship benefits may reapply for the second year of benefits, but must still meet the income standard set by the board for the student's graduating class.

(2) Promise scholarships are not intended to supplant any grant, scholarship, or tax program related to postsecondary education. If the board finds that promise scholarships supplant or reduce any grant, scholarship, or tax program for categories of students, then the board shall adjust the financial eligibility criteria or the amount of scholarship to the level necessary to avoid supplanting.

(3) Within available funds, each qualifying student shall receive two consecutive annual awards, the value of each not to exceed the full-time annual resident tuition rates charged by Washington's community colleges. The higher education coordinating board shall award scholarships to as many students as possible from among those qualifying under this section.

(4) By October 15th of each year, the board shall determine the award amount of the scholarships, after taking into consideration the availability of funds.

(5) The scholarships may only be used for undergraduate coursework at accredited institutions of higher education in the state of Washington.

(6) The scholarships may be used for undergraduate coursework at Oregon institutions of higher education that are part of the border county higher education opportunity project in RCW 28B.80.806 when those institutions offer programs not available at accredited institutions of higher education in Washington state.

(7) The scholarships may be used for college-related expenses, including but not limited to, tuition, room and board, books, and materials.

(8) The scholarships may not be awarded to any student who is pursuing a degree in theology.

(9) The higher education coordinating board may establish satisfactory progress standards for the continued receipt of the promise scholarship.

(10) The higher education coordinating board shall establish the time frame within which the student must use the scholarship.

Wash. Rev. Code 28B.119.020
Implementation and administration.
The higher education coordinating board, with the assistance of the office of the superintendent of public instruction, shall implement and administer the Washington promise scholarship program described in RCW 28B.119.010 as follows:

(1) The first scholarships shall be awarded to eligible students enrolling in postsecondary education in the 2002-03 academic year.

(2) The office of the superintendent of public instruction shall provide information to the higher education coordinating board that is necessary for implementation of the program. The higher education coordinating board and the office of the superintendent of public instruction shall jointly establish a timeline and procedures necessary for accurate and timely data reporting.

(a) For students meeting the academic eligibility criteria as provided in RCW 28B.119.010(1)(a), the office

of the superintendent of public instruction shall provide the higher education coordinating board with student names, addresses, birth dates, and unique numeric identifiers.

(b) Public and approved private high schools under chapter 28A.195 RCW shall provide requested information necessary for implementation of the program to the office of the superintendent of public instruction within the established timeline.

(c) All student data is confidential and may be used solely for the purposes of providing scholarships to eligible students.

(3) The higher education coordinating board may adopt rules to implement this chapter.

Wash. Admin. Code 250-80-010
Purpose.

The Washington promise scholarship program recognizes and encourages the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools. The program offers a two-year scholarship for eligible students that may be used at any accredited institution within the borders of the state. The scholarship may also be used at certain Oregon institutions offering programs not offered in Washington.

Wash. Admin. Code 250-80-020
Definitions.

(1) "Board" means the higher education coordinating board.

(2) "OSPI" means the office of the superintendent of public instruction.

(3) "High school" means a secondary institution in Washington state identified by the office of the superintendent of public instruction as qualified to confer high school diplomas to a graduating senior class.

(4) "Parent(s)" mean the biological or adoptive parent of the student applicant and the spouse of a biological or adoptive parent. In cases of divorce or separation the parent for purposes of reporting income and family size is the biological or adoptive parent who provided more than one-half of the applicant's support in the previous twelve

months. The term parent does not include either foster parents or legal guardians.

(5) "Family size" is the number of people for whom the applicant's parent(s) provided more than one-half of the support in the previous twelve months.

(6) "Income," in most cases means the applicant parent's adjusted gross income (AGI) as reported on the previous calendar year's federal tax return. For the independent student, income means the student's adjusted gross income as reported on the previous calendar year's federal tax return.

(7) "Independent student" means a student whose biological parents are both deceased and there is no adoptive parent, or the student is a "ward of the court," or the student has been legally emancipated by court order. The board may also recognize a student as independent due to exceptional circumstances as recognized by the appeal committee.

(8) "Appeals committee" means a committee convened by the board to review petitions and requests by students for consideration of individual exceptional circumstances.

(9) "Median family income (MFI)" means the median income for the state of Washington, by family size, as compiled by the federal Bureau of the Census and reported annually in the *Federal Register*.

(10) "Income cutoff" means one hundred thirty-five percent of the median family income.

(11) "Academic year" means the fall, winter, and spring quarters or the fall and spring semesters between July 1st and June 30th.

(12) "Eligible student" means a person who:

(a) Graduates from a public or private high school located in the state of Washington; and

(b) Is in the top fifteen percent of his or her 2000 graduating class; or

(c) Attained a cumulative score of 1200 or better on the Scholastic Assessment Test I (SATI) on the first attempt; or

(d) Attained a cumulative score of 27 or better on the American College Test (ACT) on the first attempt; and

(e) Has a family income less than one hundred thirty-five percent of the state's median; and

(f) Enrolls at least half time in an eligible postsecondary institution in the state of Washington; and

(g) Is not pursuing a degree in theology.

(13) "Eligible postsecondary institution" means:

(a) A public institution authorized by the Washington legislature and receiving operating support through the state general fund; or

(b) A postsecondary institution, whose campus or branch campus is physically located in the state of

Washington, and who is accredited by a nationally recognized accrediting body. The recognized accrediting bodies are:

(i) Northwest Association of Schools and Colleges or a similar regional accrediting body as determined by the board;

(ii) Accrediting Bureau of Health Education Schools;

(iii) Accrediting Council for Continuing Education and Training;

(iv) Accrediting Commission of Career Schools and Colleges of Technology;

(v) The Accrediting Council for Independent Colleges and Schools;

(vi) The National Accrediting Commission of Cosmetology Arts and Sciences;

(vii) Middle States Association of Colleges and Schools, Commission on Higher Education;

(viii) New England Association of Schools and Colleges;

(ix) North Central Association of Colleges and Schools;

(x) Southern Association of Colleges and Schools;

(xi) Western Association of Schools and Colleges; or

(c) An accredited Oregon postsecondary institution that offers a program not offered in Washington and is located in either Columbia, Gilliam, Hood River, Multnomah, Clatsop, Clackamas, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco or Washington county. The institution must be accredited by one of the accrediting bodies listed above; and

(d) Agrees to administer the program in accordance with the applicable rules and program guidelines.

(14) "Authorized use period" means the period of time the eligible student has to complete using his or her scholarship.

Wash. Admin. Code 250-80-030
Application procedure.

(1) The eligible student will make application directly to the board.

(2) The completed application will include a data sheet, signed certification statement, a copy of the parent's previous calendar year's federal tax return for the purpose of verifying the income, and any other documentation requested by the board in response to missing, incomplete, or unclear information. Student income information will be accepted, in lieu of parental

information, when the board recognizes the applicant as being an independent student.

(3) The board will treat all applications in a confidential manner.

(4) Applications will be made available through several means including:

(a) Mailings to public and private high school principals in the state;

(b) Posting on the HECB website (HTTP://WWW.HECB.WA.GOV/);

(c) Direct mailing to students.

(5) The board will annually set a deadline for the receipt of applications from that year's eligible graduating high school seniors and the deadline for renewal applications from eligible students having graduated in prior years.

(6) Applications must be received by the deadline for each graduating class of high school seniors to be considered for payment at any time during the authorized use period.

Wash. Admin. Code 250-80-040
Recipient selection.

(1) Recipients include all eligible students who have completed applications prior to the annual deadline, who

are verified as having finished in the top ten percent of their senior graduating high school class, and who enroll in an eligible school.

(2) The student who is determined eligible for the first year of scholarship benefits is also presumed eligible for the second year's benefits. The student will not need to provide income information after once establishing his or her eligibility.

(3) Students not meeting the eligibly requirements for the first year of scholarship benefits may reapply for the second year of benefits.

(4) Eligibility determinations made by the appeals committee are final.

Wash. Admin. Code 250-80-050
Authorized award amounts.

(1) The maximum annual authorized award shall not exceed the representative average annual tuition and fees for resident students attending the state's community and technical colleges, as determined by the board.

(2) The actual authorized annual award for each recipient shall be the annual appropriation, as determined by the board to be available for grants, evenly prorated among the eligible students.

Wash. Admin. Code 250-80-060
Grant disbursement.

(1) Eligible students must enroll on at least a half-time status in order to receive a scholarship disbursement.

(2) Grants to students will be disbursed in equal payments, once per term, across the three quarter or two semester academic year.

(3) State of Washington public colleges and universities may request payment for funds up to the limit of the per term award for each enrolled eligible student. The state public college or university may apply the proceeds of the scholarship to any outstanding debt owed by the student to the institution. The institution must disburse any remainder directly to the eligible student.

(4) Nonstate institutions may request that checks be written to eligible students attending their schools. The board will write individual warrants payable to each eligible student and delivered to the school for disbursement.

(5) The independent university and the private vocational school must disburse the warrant once the student's half-time or greater enrollment has been verified. The school may not withhold or delay disbursement for any reason other than for less than half-time enrollment. The school has thirty days to either disburse the warrant or return it to the board.

Wash. Admin. Code 250-80-100
Program administration.

(1) The higher education coordinating board shall administer the program. The board shall be responsible for:

(a) Collection of student applications;

(b) Determination of student eligibility;

(c) Determination of the eligibility of postsecondary institutions within Washington;

(d) Adjudication of all appeals;

(e) Disbursement of awards; and

(f) Maintenance of records.

(2) The OSPI shall be responsible for:

(a) Certifying the list of qualified high schools in the state of Washington;

(b) Providing guidance to high schools as to how the top ten percent or fifteen percent of each senior graduating class shall be determined;

(c) Specifying the number of students per high school that may be named as comprising the top ten percent or top fifteen percent of the graduating class;

(d) The collection and compilation of the list from each high school of the top ten percent or top fifteen percent of each graduating high school class; and

(e) The delivery of that list to the board.

California Constitution
Article XVI, Public Finance

§ 5 – Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

Delaware Constitution
Article X, Education

§ 3 – Use of educational funds by religious schools; exemption of school property from taxation. Section 3. No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.

Florida Constitution
Article I, Declaration Of Rights

§ 3 – There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Georgia Constitution
Article I, Section 2, Origin And Structure Of Government

Paragraph VII – Separation of church and state. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Hawaii Constitution
Article X, Education – Public Education

§ 1 – The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the

support or benefit of any sectarian or private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist not-for-profit corporations that provide early childhood education and care facilities serving the general public.

Idaho Constitution
Article IX, Education And Schools Lands

§ 5 – Sectarian Appropriations Prohibited. Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

Kentucky Constitution
§ 189, School Money Not To Be Used For Church, Sectarian, Or Denominational School

No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of , any church, sectarian or denomination school.

Massachusetts Constitution
Article XLVI, Amendments

Article 46. (In place of article XVIII of the articles of amendment of the constitution ratified and adopted April 9, 1821, the following article of amendment, submitted by the constitutional convention, was ratified and adopted November 6, 1917.)

Article XVIII.

§ 2 – All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital,

institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Missouri Constitution
Article IX, Education

Prohibition of public aid for religious purposes and institutions.

§ 8 – Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

Montana Constitution
Article X, Education And Public Lands

§ 6 – Aid prohibited to sectarian schools.

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

Nevada Constitution
Article XI, Education

§ 10 – No public money to be used for sectarian purposes. No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.

New Mexico Constitution
Article XII, Education

§ 3 – [Control of constitutional educational institutions; use of state land proceeds and other educational funds.]

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of

any lands granted to the state by congress, or any other funds appropriated, levied or collected for education purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

North Dakota Constitution
Article VIII, Education

§ 5 – All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.

Oklahoma Constitution
Article II, Bill Of Rights

§ 5 – Public money or property - Use for sectarian purposes. No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Oregon Constitution
Article I, Bill Of Rights

§ 5 – No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any

money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.

South Dakota Constitution
Article VIII, Education And School Lands

Art. VIII, § 16 – Public support of sectarian instruction prohibited. No appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift, or bequest of lands, money, or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

Texas Constitution
Article I – Bill Of Rights

§ 7 – Appropriations For Sectarian Purposes. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

Vermont Constitution
Chapter 1, Article III

Article 3rd. Freedom in religion; right and duty of religious worship (notes)

That all persons have a natural and unalienable right, to worship Almightly God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person

ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Wyoming Constitution
Article I, Declaration Of Rights

§ 19 – Appropriations for sectarian or religious societies or institutions prohibited – No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.